

## Boston College Law Review

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Volume 55 | Issue 5

Article 4

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11-25-2014

# A Dynamic Theory of Judicial Role

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### Recommended Citation

David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C.L. Rev. 1501 (2014),  
<http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4>

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# A DYNAMIC THEORY OF JUDICIAL ROLE

DAVID LANDAU\*

**Abstract:** Recent scholarship has focused heavily on the activism of courts in the fragile democracies of the “Global South.” Courts in countries like India, Colombia, and South Africa have issued landmark decisions in difficult political environments, in the process raising unanswered questions about the appropriate conception of judicial role in these climates. Much of the judicial and academic effort in these contexts is self-consciously oriented towards using courts to carry out basic improvements in the quality of political systems seen as badly deficient. In other words, the core task is to improve the quality of the democratic system over time. These kinds of democracy-improving theories obviously bear a resemblance to “political process” theories in United States constitutional law, but generally differ in terms of the sweeping degree to which democracy is viewed as dysfunctional. This Article critically examines the democracy-improving model of judicial review. It argues that such a theory faces several important challenges: more work must be done to assess the plausibility and effectiveness of judicial action to improve democracy, as well as the ability of the theory to distinguish between proper and improper uses of judicial power. At the same time, it sheds new light on important problems in the field of comparative constitutional law and suggests a useful empirical agenda: rather than asking whether courts actually are overstepping their bounds by taking on legislative tasks, scholars can ask about the effects of different strategies of judicial activism on the evolution of different kinds of dysfunctional political institutions.

## INTRODUCTION

Recent scholarship has focused on the role of constitutional courts in new or threatened democracies.<sup>1</sup> This literature has pointed out that these courts are

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<sup>1</sup> For examples of the recent literature on democratic transitions and judicial role, see Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 964 (2011) [hereinafter Issacharoff, *Constitutional Courts*] (studying the role of constitutional courts in protecting democratic orders); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1406 (2007) [hereinafter Issacharoff, *Fragile Democracies*] (arguing that the fragility of some democratic orders justifies measures like the banning of certain parties in order to preserve the democratic order); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200–11 (2013) (considering the

often faced with particular challenges that are different from the ones found in more mature democracies. Courts may act in “fragile democracies” that are at risk of sliding back into authoritarianism. They often act in the midst of poorly-functioning political systems, and they generally face the challenge of enforcing rights—like socioeconomic rights—that are costly to enforce. At the same time, any assumption that courts acting in poorly-functioning political environments are always weak courts has been definitively proven false. Courts in places like India, Colombia, and South Africa have shown a surprising level of activism and independence.

This work problematizes the relationship between judicial review and democracy in different kinds of political contexts. Most clearly, it suggests the following question: what is the relevance of standard constitutional theory, which was developed largely in the United States, to contexts where democratic regimes are particularly vulnerable to overthrow or where democratic institutions are poorly-functioning?

Standard democratic theory, as developed in the United States and Europe, rests on premises that—by their own terms—do not apply in many newer democracies. For example, Jeremy Waldron’s case for judicial deference rests on an assumption of well-functioning political institutions,<sup>2</sup> and Mark Tushnet’s case for popular constitutionalism assumes a robust constitutional culture.<sup>3</sup> A series of dysfunctions in new democracies—vulnerability to authoritarian erosion, defects in party systems and legislative institutions, and an absence of constitutional culture—render these assumptions inapplicable. The key question then becomes: if standard political theory is inapplicable, what is the proper conception of judicial role? New scholarship argues that there is a distinctive “constitutionalism of the Global South,” but to date this literature has focused more on a set of problems or topics faced by developing regimes, such as socioeconomic rights or access to justice, rather than on a unifying conception of the judicial role.<sup>4</sup>

This Article aims to fill that gap. Descriptively, it shows that judicial role and constitutional design in new democracies often work off of the premise

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problem of constitutional changes that work a significant erosion to the “democratic order,” as well as responses to the problem); Ozan Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 409 (2014) (arguing that the use of temporary rather than permanent constitutions can help to resolve various problems associated with democratic transitions).

<sup>2</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1362 (2006) (making explicit an assumption of a legislature in “reasonably good working order”).

<sup>3</sup> See Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2255–56 (2013).

<sup>4</sup> See, e.g., Daniel Bonilla Maldonado, *Introduction: Towards a Constitutionalism of the Global South*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1 (Daniel Bonilla Maldonado ed., 2013) [hereinafter CONSTITUTIONALISM OF THE GLOBAL SOUTH] (introducing a comparative study of three topics: socioeconomic rights, cultural diversity, and access to justice).

that democratic institutions should be distrusted, and not just to protect insular minorities but also to carry out majoritarian will. Judges and constitutional drafters in these countries are notably unconcerned with the classic counter-majoritarian difficulty or the dilemma of courts imposing on democratic space and taking on legislative roles. This is because they are focused on a different problem: how to make democratic institutions work better. Courts and other non-democratic institutions often see their role within such a regime as *dynamic* in nature: they aim to improve the performance of political institutions through time.

I bring together evidence chiefly from three widely studied countries—Colombia, India, and South Africa—to show how courts have developed tools to protect democracies from erosion from within, to ameliorate defects in different kinds of party systems, and to build up civil society and constitutional cultures. A range of practices in newer democracies can best be understood through a dynamic rather than a traditional conception of judicial role. For example, courts in newer democracies routinely strike down constitutional amendments as being substantively unconstitutional because they view those amendments as a threat to democracy. From a standard theoretical perspective, striking down constitutional amendments is a much more difficult act to justify than ordinary judicial review. As commentators have often noted, declaring a constitutional amendment unconstitutional poses a kind of ultimate counter-majoritarian difficulty, because there is no real way for democratic actors to override the decision to strike down the constitutional amendment.<sup>5</sup> But the doctrine of the unconstitutional constitutional amendment becomes easier to understand with a dynamic theory, either as a way to defend against democratic erosion or as a way to send a loud signal about the importance of core constitutional values.

Normatively, this article proceeds more cautiously, but suggests that a dynamic theory of judicial role is both defensible and useful in guiding scholars towards a fruitful set of questions. It sheds new light on some of the most active and difficult debates in the field of comparative constitutional law. Take, for example, the debate on socioeconomic rights enforcement between scholars, like Tushnet and Cass Sunstein, favoring “weaker” and more dialogical methods of enforcement and those scholars instead favoring more aggressive or “harder” approaches like structural injunctions.<sup>6</sup> The main question analysts

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<sup>5</sup> See, e.g., Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1799 (2004) (noting that the doctrine raises perhaps the “most extreme” form of the counter-majoritarian difficulty).

<sup>6</sup> See CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221–38 (2001) (considering social and economic rights cases in the South African context as using “weak-form” judicial action); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL

have asked is how to square effective judicial review of socioeconomic rights—which puts courts in the awkward position of having to prioritize and manage resource allocation—with due deference to democratic institutions. A dynamic perspective suggests a somewhat distinct agenda that transcends the “strong-form”/“weak-form” typology: courts and scholars should focus on figuring out which kinds of strategies best serve to empower civil society and to spread constitutional values. Courts engaged in such strategies can use a range of tools that lie somewhere on a spectrum between strong-form and weak-form enforcement: drafting in civil society groups to monitor compliance and formulate policy ideas, publicizing both constitutional issues and compliance failures, expanding access to the court for organizations, etc.<sup>7</sup> All of these tools can be employed without having more dialogical exercises of review necessarily collapse into a strong version of judicial supremacy.

More broadly, a dynamic approach suggests an empirical agenda that should guide future work. Although much recent scholarship has studied the *causes* of judicial independence in difficult environments, very little scholarship has considered the *effects* of judicial activism of different types. A dynamic conception of judicial role places this question front and center, because it requires that both judges and scholars grapple with the question of how judicial interventions of different types impact the evolution of democratic institutions. It thus demands that judges consider both questions of plausibility and effectiveness. Plausibility concerns which strategies are likely to be possible in different political contexts, while effectiveness concerns which kinds of judicial interventions are likely to have positive rather than negative impacts on democratic development. The theory’s ultimate value, therefore, is in asking a fresh set of questions about the judicial role.

The rest of this article is organized as follows. Parts I and II develop the descriptive project by demonstrating both the problem of democratic dysfunction and a typology of the practices of constitutional courts and allied institutions in improving democratic performance.<sup>8</sup> I sort judicial action into three main boxes: tools designed to protect against democratic erosion, tools designed to ameliorate weaknesses in political institutions, and attempts to build democratic spaces around political institutions by building up civil society and spreading constitutional culture.<sup>9</sup> Part III develops the normative project, arguing that a democracy-improving perspective is the most reasonable fit for this descriptive evidence, and that such a theory raises a new set of questions about

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WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 228 (2008) (arguing that “weak-form” or dialogic review offers the best way for courts to enforce socioeconomic rights).

<sup>7</sup> See *infra* notes 258–287 and accompanying text.

<sup>8</sup> See *infra* notes 13–173 and accompanying text.

<sup>9</sup> See *infra* notes 86–173 and accompanying text.

judicial strategies and about the effects of different kinds of activism.<sup>10</sup> Part IV demonstrates the theory in action by providing new perspectives on two live controversies in comparative constitutional law: the debate between proponents of weak-form and strong-form review, and the problem of unconstitutional constitutional amendments.<sup>11</sup> The Conclusion argues that a dynamic theory has the potential to guide a productive agenda for scholars interested in the very live problem of judicial role in newer or more fragile democracies.<sup>12</sup>

## I. DEMOCRATIC DYSFUNCTION & CONSTITUTIONAL PROJECTS

This Part considers descriptive evidence about a particular set of challenges that tend to be faced by certain democracies of the “Global South.” These include at least three classes of problems: (1) problems of democratic fragility,<sup>13</sup> (2) problems of democratic functioning,<sup>14</sup> and (3) absence of constitutional culture.<sup>15</sup> Further, it presents evidence that these kinds of dysfunctions matter to constitutional designers, judges, and to the scholars focused on the constitutional systems under study.<sup>16</sup> Neither claim, of course, is monolithic: the countries of the Global South, and more particularly the three countries focused on in the study, vary in important ways in terms of both the kinds of problems they face and the constitutional responses to those problems. So the claim here is a narrow one: the problem of democratic dysfunction—perhaps democratic irregularity—is a central concern of the constitutionalism of the countries under study.

### A. The Problems of Democratic Dysfunction

As much recent political science work has documented, the category “democracy” is complex and possesses considerable variation.<sup>17</sup> Many newer democracies suffer from several different kinds of problems with their political systems: (1) they are more likely to face erosion towards authoritarianism, or in other words are particularly “fragile”; (2) they suffer from problems in political representation, accountability, and capacity that make them function poorly even if they do not lead to democratic breakdown; and (3) they suffer from a general absence of constitutional culture—neither politicians nor the public

<sup>10</sup> See *infra* notes 174–254 and accompanying text.

<sup>11</sup> See *infra* notes 255–325 and accompanying text.

<sup>12</sup> See *infra* notes 326–327 and accompanying text.

<sup>13</sup> See *infra* notes 17–35 and accompanying text.

<sup>14</sup> See *infra* notes 36–57 and accompanying text.

<sup>15</sup> See *infra* notes 59–64 and accompanying text.

<sup>16</sup> See *infra* notes 70–85 and accompanying text.

<sup>17</sup> For a classic study of the variation in the term “democracy,” see generally David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 WORLD POL. 430 (1997).

cares about constitutional values. This section addresses these three points in turn.

First, though, two caveats. First, the list here is meant to be exemplary of problems faced by developing democracies, rather than comprehensive. Second, the problems identified here represent differences of degree, and not of kind, with the problems faced by mature democracies. Some problems of democratic dysfunction exist in all systems, but it would be a mistake for a theory of judicial role to ignore real differences between mature and developing democracies.

### 1. The Problem of “Fragile” Democracy

Recent scholarship has focused on the problem of “fragile democracies”—regimes that are particularly likely to fall back into some variant of authoritarianism.<sup>18</sup> Breakdowns of democracy into full-fledged authoritarianism, through military coup or similar device, are now rarer than they were in the past.<sup>19</sup> But erosions into hybrid or competitive authoritarian regimes, which combine elements of democracy and authoritarianism, have become increasingly common.<sup>20</sup> A competitive authoritarian regime is democratic in the sense that elections are held and those elections are not outright shams, but it is authoritarian in the sense that the playing field is systematically tilted in favor of incumbents.<sup>21</sup> These incumbents use their control over institutions like the me-

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<sup>18</sup> See Issacharoff, *Fragile Democracies*, *supra* note 1, at 1406 (noting that “antidemocratic groups” may seek to use the democratic electoral system for their own benefit). Note, though, that Issacharoff is talking mostly about the susceptibility of democratic regimes to erosion or overthrow. See *id.* at 1408 (asking whether “democracies act not only to resist having their state authority conscripted to the cause of intolerance, but also, under certain circumstances, to ensure that their state apparatus not be captured wholesale for that purpose”).

<sup>19</sup> See FREEDOM HOUSE, RELEASE BOOKLET, FREEDOM IN THE WORLD 2013: DEMOCRATIC BREAKTHROUGHS IN THE BALANCE 28 (2013), available at [http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet\\_0.pdf](http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet_0.pdf), archived at <http://perma.cc/C3GF-B7Q5> (noting that the percentage of countries classified as “not free” has dropped from forty-six percent in 1972 to twenty-four percent in 2012, but the percentage of countries classified as “partly free” has increased from twenty-five percent to thirty percent).

<sup>20</sup> The literature originated in political science as an attempt to explain post-Cold War regime types that combined features of democracy and authoritarianism. See, e.g., STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 3 (2010) (arguing that many transitions to democracy in the post-Cold War period have stopped at an intermediate point between democracy and authoritarianism); Andreas Schedler, *The Logic of Electoral Authoritarianism*, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION 1 (Andreas Schedler ed., 2006) (arguing that a number of regimes “have established the institutional facades of democracy, including regular multiparty elections for the chief executive, in order to conceal (and reproduce) harsh realities of authoritarian governance”); Larry Diamond, *Thinking About Hybrid Regimes*, J. DEMOCRACY, Apr. 2002, at 21–23 (noting that various regimes around the world like Russia, Turkey, and Venezuela appear to hold elections but yet are not truly democratic).

<sup>21</sup> See LEVITSKY & WAY, *supra* note 20, at 6 (arguing that a “reasonably level playing field” requirement be added to definitions of democracy).

dia, judiciary, and electoral commissions, to make it unlikely they will actually lose elections even when the vote counting is fair.<sup>22</sup>

It is relatively easy for some regimes to slip from being a democratic regime to a hybrid regime, because a would-be autocrat need not adopt an obviously authoritarian constitution. Instead, they can merely take steps to pack or neutralize institutions that are supposed to act as a check, while making some relatively subtle legal changes to entrench their own power.<sup>23</sup> I, and others, have described these kinds of democratic erosions in detail elsewhere.<sup>24</sup> Here a few examples will suffice.

Recently in Latin America, presidents in Venezuela and Ecuador have replaced their existing constitutions with new ones in order to consolidate their power. In Venezuela, for example, President Hugo Chávez took office in 1999 with a bare majority of votes, but faced opposition majorities in the Congress, Supreme Court, and at the subnational level.<sup>25</sup> Without any express legal authority, he convened a Constituent Assembly, elected in accordance with rules that marginalized the opposition, to replace the constitution.<sup>26</sup> The new constitutional order created a more powerful president and allowed Chávez to close down and repopulate existing institutions working against him.<sup>27</sup> With his power consolidated, Chávez was able to push through successive constitutional amendments, most importantly one allowing him to remain in office indefinitely.<sup>28</sup> Chávez's use of the tools of constitutional change did not eliminate the opposition, but it did allow him to gain significant advantages due to his con-

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<sup>22</sup> See *id.* at 9–12.

<sup>23</sup> One example of the way this occurs is by amending constitutions to extend term limits. See *infra* note 294 and accompanying text; see also Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1810–13 (2011).

<sup>24</sup> See, e.g., Landau, *supra* note 1, at 200–11 (giving examples of regimes that have suffered from democratic erosion).

<sup>25</sup> See, e.g., Michael Coppedge, *Venezuela: Popular Sovereignty Versus Liberal Democracy*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 165, 179 tbl.8.5 (Jorge I. Domínguez & Michael Shifter eds., 2d ed. 2003) (showing that the traditional parties still controlled clear majorities in Congress after Chávez was elected).

<sup>26</sup> See Renata Segura & Ana María Bejarano, ¡Ni una asamblea más sin nosotros! *Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 CONSTELLATIONS 217, 228–30 (2004) (noting that Chávez's movement won sixty-five percent of votes, but because of the electoral rules, won about ninety-five percent of seats in the Assembly).

<sup>27</sup> See ALLAN R. BREWER-CARÍAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT 57–60 (2010) (recounting how the Assembly used an assertion of “original constituent power” to shut down institutions including the Congress and the Supreme Court).

<sup>28</sup> See Juan Forero, *Chávez Wins Removal of Term Limits*, WASH. POST (Feb. 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/15/AR2009021500136.html>, archived at <http://perma.cc/8XRV-Z6HR>.



trol of the media, courts, and state patronage, and he was removed from power only with his death.<sup>29</sup>

More recently, in Hungary, the right-wing party Fidesz took power, again with a bare majority of votes, but because of the voting rules won more than two-thirds of seats in Parliament.<sup>30</sup> With this number of seats, and given the constitutional amendment and replacement rules in the Hungarian Constitution, it was able to amend or replace the existing constitution unilaterally.<sup>31</sup> The Fidesz party began by passing a series of constitutional amendments that weakened institutions designed to check its political power, such as the judiciary.<sup>32</sup> A key amendment stripped the Hungarian Constitutional Court, a historically independent and powerful institution, of jurisdiction over laws dealing with fiscal and other important matters.<sup>33</sup> Fidesz then moved forward with a wholesale replacement of the existing constitution; the new constitution weakens the judiciary and other checking institutions, for example by altering selection rules.<sup>34</sup> Many commentators argue that Fidesz has worked a significant erosion of democracy in Hungary by making itself harder to dislodge and by weakening checks on exercises of power.<sup>35</sup>

## 2. Problems of Poorly-Functioning Democracy

Beyond the threat of breakdown, newer democracies may also differ from more mature democracies along a related dimension: they may have systematic deficiencies in political representation, accountability, and capacity. The self-perception of many emerging democratic regimes is not just that they are particularly prone to erosion or breakdown, but also that they do not function well. Representativeness refers to the question of whether elected officials actually push policies favored by their constituents; accountability refers to the question of whether voters and other institutions can punish political actors who either perform poorly or who exceed their powers; and capacity refers to the ability of political actors to gather information about social problems and

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<sup>29</sup> See Steven Levitsky & Lucan A. Way, *Elections Without Democracy: The Rise of Competitive Authoritarianism*, J. DEMOCRACY, Apr. 2002, at 51, 61 (classifying Chávez-led Venezuela as a competitive authoritarian regime).

<sup>30</sup> See Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, J. DEMOCRACY, July 2012, at 138–39 (describing Fidesz's victory in 2010).

<sup>31</sup> See *id.* at 142.

<sup>32</sup> See *id.* at 143.

<sup>33</sup> See Gábor Halmai, *Unconstitutional Constitutional Amendments: Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 192 (2012). The amendment was challenged in front of the constitutional court as an unconstitutional constitutional amendment, but the Court refused to utilize such a doctrine to strike down the amendment. See *id.* at 194–97.

<sup>34</sup> See Bánkuti et al., *supra* note 30, at 142–44 (describing the new constitution and its process of approval).

<sup>35</sup> See, e.g., *id.* at 144.

to formulate effective policy responses to them.<sup>36</sup> Political scientists tend to attribute some problems along all three dimensions to defects in party systems, and more particularly to two types of systems commonly seen in the developing world: the non-institutionalized (or weak) party system and the dominant-party system.

A non-institutionalized party system is one where parties lack durable roots in society.<sup>37</sup> Thus, within these systems, parties turn over quickly, changing their share of the vote and even disappearing with great frequency.<sup>38</sup> Parties in these kinds of systems often have weak or non-existent ideological platforms, with personality replacing policy as a key determinant of votes.<sup>39</sup> Newer party systems in countries that have experienced democratic transitions often have non-institutionalized party systems because organizing stable and coherent parties is a task that takes time.<sup>40</sup> Parties need to establish internal structures, links with outside groups like unions and business organizations, and a reputation for effectiveness at carrying out a certain political agenda—none of these tasks can be undertaken instantaneously. In the absence of organization, actors form parties around individual personalities or irrelevant issues: a famous example is the Beer Lovers party that formed in Poland following the democratic transition.<sup>41</sup> New democracies like Egypt may thus be relatively unlikely to have institutionalized party systems.<sup>42</sup> Further, party systems can deinstitutionalize even in systems that once had stable and well-defined party systems, particularly where voters lose confidence in the legitimacy of existing political structures. Colombia and Venezuela offer two examples from recent

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<sup>36</sup> See Michael Shifter, *Emerging Trends and Determining Factors in Democratic Governance*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA, *supra* note 25, at 3, 5 (discussing Latin America's "tremendous democratic deficits on a variety of fronts").

<sup>37</sup> For the classic treatment in the political science literature, see Scott Mainwaring & Timothy R. Scully, *Introduction: Party Systems in Latin America*, in BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 1, 4–6 (Scott Mainwaring & Timothy R. Scully eds., 1995).

<sup>38</sup> See *id.* at 7–8 (comparing the volatility of voting patterns across different Latin American countries).

<sup>39</sup> See *id.* at 5 (noting that in non-institutionalized party systems, "more citizens have trouble locating what the major parties represent even in the broadest terms," and that these systems undergo frequent "[c]hanges in relative ideological position").

<sup>40</sup> See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 422–25 (1968) (arguing that party systems are often weak and non-institutionalized in new democracies).

<sup>41</sup> See, e.g., Stanisław Gebethner, *Parliamentary and Electoral Parties in Poland*, in PARTY STRUCTURE AND ORGANIZATION IN EAST-CENTRAL EUROPE 120, 121, 122 (Paul G. Lewis ed., 1996) (attributing the moderate success of the Beer Lover's party to pervasive distrust of any political party following the fall of socialism).

<sup>42</sup> See, e.g., Marwan Muasher, *The Path to Sustainable Political Parties in the Arab World*, CARNEGIE ENDOWMENT FOR INT'L PEACE 2 (Nov. 13, 2013), <http://carnegieendowment.org/2013/11/13/path-to-sustainable-political-parties-in-arab-world>, archived at <http://perma.cc/R3PC-J3UY> (noting the difficulty that new Egyptian parties have had in getting organized and noting the asymmetry between the newer parties, which are disorganized, and forces like the Muslim Brotherhood, which have had a long time to organize).

Latin American history where once-institutionalized party systems dissolved, leaving a vacuum.<sup>43</sup>

Non-institutionalized party systems lead to problems of representation because the absence of clear platforms or durable parties obscures links between voters and elected officials, and thus policy made by elected officials need not represent the public will.<sup>44</sup> Further, they may lead to accountability problems, primarily because elected officials are not rooted in strong party organizations. For example, presidential or semi-presidential regimes with non-institutionalized party systems tend to elect outsiders as chief executives, and these outsiders may be difficult for either legislatures or other institutions like courts to control.<sup>45</sup> The relatively recent cases of Álvaro Uribe in Colombia, Chávez in Venezuela, Rafael Correa in Ecuador, and Alberto Fujimori in Peru all demonstrate how non-institutionalized or deinstitutionalizing party systems tend to produce political outsiders as presidents, and how these outsiders may threaten at least horizontal mechanisms of political accountability.<sup>46</sup> Finally, non-institutionalized party systems may be correlated with weaknesses in capacity. This is easiest to see in the case of legislatures: a legislature composed of small, personalist parties and high turnover is unlikely to acquire the expertise to either develop policy or to supervise the executive's initiatives.<sup>47</sup> In other words, a legislature in a non-institutionalized party system is more likely to seek to "abdicate" its powers than to "empire build."<sup>48</sup>

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<sup>43</sup> In Colombia, a stable two-party system broke down in the 1990s as voters became disenchanted with traditional political institutions: an institutionalized party system was replaced with an inchoate party system with personalist parties. See Eduardo Pizarro Leongómez, *Giants with Feet of Clay: Political Parties in Colombia*, in *THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES* 78, 78–79 (Scott Mainwaring et al. eds., 2006). In Venezuela, a similarly stable two-party system imploded quickly and was replaced with a vacuum that was filled by Hugo Chávez and his movement. See Coppedge, *supra* note 25, at 167, 182–83.

<sup>44</sup> See Mainwaring & Scully, *supra* note 37, at 5 (noting that non-institutionalized party systems lack strong "linkages between citizens and parties").

<sup>45</sup> See Guillermo O'Donnell, *Delegative Democracy*, *J. DEMOCRACY*, Jan. 1994, at 55, 60 (noting how elected presidents operating in non-institutionalized party systems sometimes run on platforms where they put themselves above politics and outside of political parties).

<sup>46</sup> See, e.g., Maxwell A. Cameron, *The State of Democracy in the Andes: Introduction to a Thematic Issue of Revista de Ciencia Política*, 30 *REVISTA DE CIENCIA POLÍTICA* 5, 9–13 (2010) (tracing trends across different countries in the Andean region).

<sup>47</sup> See, e.g., Scott Morgenstern, *Explaining Legislative Politics in Latin America*, in *LEGISLATIVE POLITICS IN LATIN AMERICA* 413, 431 (Scott Morgenstern & Benito Nacif eds., 2002) (arguing and providing evidence for the proposition that "only cohesive opposition parties—or coalitions—with majority control will have the means, method, and incentive to assert legislative authority").

<sup>48</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *HARV. L. REV.* 915, 920 (2005) (noting that the assumption that political institutions are out to expand their power rather than abdicate is an often-false assumption even of United States constitutional law).

Dominant-party systems form a second, somewhat different kind of problem common in the developing world.<sup>49</sup> In these systems, a single party tends to win most elections. This is a common problem: Mexico was a dominant-party system for most of the prior century; India had this kind of system for much of its democratic history; South Africa—along with much of the rest of Africa—has this kind of system today; and Turkey may be evolving into such a system.<sup>50</sup> These systems emerge where the organizational problems left unresolved in the non-institutionalized system case are resolved, but in an asymmetric way: one party or movement grabs most of the organizational resources.<sup>51</sup> Once established, these sorts of systems may be difficult to dislodge because the incumbents will gain enormous advantages in terms of resources and organization over their opponents.<sup>52</sup>

Thus, dominant-party systems again raise challenges along the three dimensions of representation, accountability, and capacity. There is a possibility that some groups of voters not part of the coalitions for the winning party will get permanently frozen out. When this happens, the dominant party has no incentive to represent the interests of losing parties, and opposition groups will be unable to do so.<sup>53</sup> Further, the fact that the same party is virtually guaranteed to win every election may weaken the accountability between political leaders and voters; a party virtually guaranteed to win the next election has fewer incentives to pay attention to even the voters composing its coalition.<sup>54</sup> The dominance of a single party will also lead to predictable problems with horizontal accountability: control institutions like ombudsmen and comptrollers may be packed by members of the dominant party rather than having the necessary independence.<sup>55</sup> Finally, these systems may beget problems of bu-

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<sup>49</sup> For an overview to the theoretical issues within the particular context of South Africa, see Sujit Choudhry, "He Had a Mandate"; *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 8–19 (2009) (S. Afr.).

<sup>50</sup> See generally Hermann Giliomee & Charles Simkins, *The Dominant Party Regimes of South Africa, Mexico, Taiwan, and Malaysia: A Comparative Assessment*, in THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY 1 (Hermann Giliomee & Charles Simkins eds., 1999) (providing an overview of these different regimes).

<sup>51</sup> See, e.g., LEVITSKY & WAY, *supra* note 20, at 56 (noting that hybrid regimes, which usually consist of one-party dominant regimes, are a solution to problems of political disorganization and, themselves, rely on organization to survive).

<sup>52</sup> See *id.* at 9–12.

<sup>53</sup> See Giliomee & Simkins, *supra* note 50, at 40–41.

<sup>54</sup> See Steven Friedman, *No Easy Stroll to Dominance: Party Dominance, Opposition and Civil Society in South Africa*, in THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY, *supra* note 50, at 97, 106–07.

<sup>55</sup> See, e.g., Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. CT. REV. (forthcoming 2014) (S. Afr.) (noting the ways in which the dominant-party ANC in South Africa is able to undermine institutions that are supposed to check it).

reaucratic capacity, in some cases by allowing corruption to flourish and to influence appointments and behavior with the bureaucracy.<sup>56</sup>

It is worth noting that serious problems of representation, accountability, and capacity often exist even without these particular configurations in party systems. Capacity, for example, is often weak in newer democracies just because it takes considerable time and resources to build up competent bureaucrats. Pervasive problems of corruption, which run across a large number of less mature democracies, also impact the quality of representation and the extent of accountability by weakening the links between voters and officials and by allowing officials to weaken horizontal checks on their own power.<sup>57</sup>

### 3. Problems of Constitutional Culture

Finally, many theories of American constitutionalism rest at base on the notion that the “people” care about the constitution and its meaning—in other words, that the constitution is taken seriously as an object of social and political discourse.<sup>58</sup> This conception obviously lies at the root of the “popular constitutionalist” movement in the United States. The main animating principle of this movement is that at least some power of constitutional interpretation should be taken away from the judiciary and given to the people, either exercised directly or through their political representatives.<sup>59</sup> Yet this idea that constitutional principles should be realized in the political realm, rather than through judicial elaboration, requires an assumption that members of the public themselves care about constitutionalism.<sup>60</sup> Much of the case for reining in judiciaries in the name of popular constitutionalism depends, then, on the existence of constitutional culture.

This assumption is very plausible in the United States, which has a long history of carrying on political disputes as fights about the meaning of the

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<sup>56</sup> For how similar problems could manifest with an entrenched executive rather than a party, see *infra* notes 294–296 and accompanying text (discussing the potential threat that could have been posed by Colombian President Uribe taking a third term and abusing his powers of appointment).

<sup>57</sup> See Kanybek Nur-tegin & Hans J. Czap, *Corruption: Democracy, Autocracy, and Political Stability*, 42 ECON. ANALYSIS & POL’Y 51, 51, 58, 62–63 (2012) (finding that levels of corruption in unstable democracies are high, although lower than in autocratic regimes).

<sup>58</sup> See *infra* note 60 and accompanying text.

<sup>59</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 106–10 (2004) (arguing for a version of departmentalism, where each branch of government would have its own power of constitutional interpretation); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 193–94 (1999) (arguing that the development of constitutional meaning should be left primarily in the hands of political rather than judicial actors); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 180–94 (searching for ways to allow popular constitutionalism to be implemented as part of a practical reform program in the United States).

<sup>60</sup> See Tushnet, *supra* note 3, at 2255.

Constitution.<sup>61</sup> Some other mature democracies (although not all) have similarly robust constitutional cultures.<sup>62</sup> But—although systematic empirical study is almost non-existent—the assumption seems to break down in many new democracies. Some of these systems are new to democratic constitutionalism and thus have little history or experience internalizing constitutional values. Others have a history of living under “sham constitutionalism”—documents that purported to create liberal democracies, but are in fact widely ignored or ineffectual.<sup>63</sup> Finally, some have experienced a dizzying array of constitutions in succession, with none of the texts seeming to have much meaning or real-world impact.<sup>64</sup> Constitutions in these circumstances still play valuable functions. They may, for example, help elites solve coordination games involving which actor gets to wield which type of power. But they are not likely to serve as a widely-known source of national values, at least not initially.<sup>65</sup>

The typology of different dysfunctions outlined here suggests a series of independent but related problems with democratic functioning. First, newer democracies often suffer from very high risks that political action will endanger democracy itself—they are particularly fragile.<sup>66</sup> Second, newer democracies often have political institutions that do not effectively channel the will of the people—they are poorly-functioning.<sup>67</sup> And third, the public itself often does not care much about constitutional meaning and will therefore presumably not pressure political actors into making decisions based on constitutional meaning.<sup>68</sup>

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<sup>61</sup> For an account of the construction of this constitutional culture in the first generation of the independent United States, see Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005) (describing how civic associations served as a key agent for inculcating constitutional values to ordinary people).

<sup>62</sup> In Germany, for example, recent scholarship has traced the rise of “constitutional patriotism” in the post-war period. See Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 CONTEMP. POL. THEORY 278, 279 (2006) (arguing that Germans view their Constitution as the “focal point of democratic loyalty”).

<sup>63</sup> See David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 864 (2013) (measuring the match between constitutional text and actual compliance with constitutional norms, and finding the highest levels of divergence in Asia and Africa).

<sup>64</sup> See, e.g., Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT’L L.J. 1, 34 (2006) (finding that Latin American constitutions were designed to be “flexible” so as to suit elite interests but never captured “broad citizen support”); Daniel Lansberg-Rodriguez, *Wiki-Constitutionalism*, NEW REPUBLIC (May 25, 2010), <http://www.newrepublic.com/article/politics/75150/wiki-constitutionalism>, archived at <http://perma.cc/9JXM-CDJ2> (noting the excessive numbers of constitutions in many Latin American countries).

<sup>65</sup> See Schor, *supra* note 64, at 34.

<sup>66</sup> See *supra* notes 18–35 and accompanying text.

<sup>67</sup> See *supra* notes 36–57 and accompanying text.

<sup>68</sup> See *supra* notes 58–64 and accompanying text.

*B. Judicial Perception and Constitutional Design  
in Dysfunctional Democracies*

A key question is how judges, scholars, and constitutional designers within nascent democracies have analyzed these problems internally. Most realistic efforts at normative constitutional theory should build on this self-perception. Indeed, scholars and judges working on developing countries do cite and rely on perception of problems in their own democratic systems, and constitutional design has been attuned to these problems.<sup>69</sup> Judges (as well as citizens and constitutional designers) can, and sometimes do, overstate the problems with their own political systems. But it is relevant to any conception of the judicial role that judges, scholars, and constitutional designers recognize defects in their own political systems.

The Indian and Colombian high court justices have been particularly clear in this regard. In Colombia, Constitutional Court justices openly treat the weaknesses in political institutions—and particularly in the Congress—as a justification for their choice to take on a protagonist's role. In one famous decision striking down a national security law because of weaknesses in democratic deliberation, the Court complained that the Congress “should be” a “space of public reason.”<sup>70</sup> In another case striking down a tax reform, the Court noted that a measure expanding the VAT tax to basic necessities had not been the product of “a minimum of rational deliberation.”<sup>71</sup> One justice, pointing across the main square in Bogotá from the Constitutional Court, explained that the Court, rather than the Congress, is the center of public protest, because the Court “has more relevance to people's lives.”<sup>72</sup>

Likewise, Nick Robinson argues that the Indian Supreme Court's perception of systematic problems in elected democratic institutions has led it to seek an expanded mandate and to become a kind of “good governance court.”<sup>73</sup> For example, then-Chief Justice K.G. Balakrishnan stated that arguments in favor of judicial restraint “fail[] to recognize the constant failures of governance tak-

<sup>69</sup> See, e.g., *infra* notes 153–154 and accompanying text (describing a “state of unconstitutional conditions” that was declared by the Colombian Constitutional Court in response to a housing crisis).

<sup>70</sup> See Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, § VII.138, available at <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm>, archived at <http://perma.cc/4R99-HGY8> (“Congress is a space of public reason. Or at least the Constitution postulates that it should be.”) (author's translation).

<sup>71</sup> See Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, § VII.4.5.6.1, available at <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm>, archived at <http://perma.cc/495S-6XL5> (author's translation).

<sup>72</sup> Interview with Constitutional Court Justice, in Bogotá, Colom. (Aug. 20, 2009) (notes and contact information on file with author). Because of the sensitivity of the subject matter the judge interviewed requested anonymity. The interviewee does not endorse my analysis or conclusions, nor is the interviewee responsible for any errors I may have made.

<sup>73</sup> See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 8–17 (2009).

ing place at the hands of the other organs of State, and that it is the function of the Court to check, balance and correct any failure arising out of any other State organ.”<sup>74</sup> In both of these systems, the justices are giving voice to broadly-felt perceptions about the low quality of democratic institutions.

The situation in South Africa is somewhat different: there, sets of scholars surrounding the Court, rather than the Court itself, have focused on the problems of dominant-party democracy. These scholars have focused on the existence of a dominant party as one of the fundamental challenges faced by the Court, and have analyzed both the extent to which it limits the Court’s range of options and the ability of the Court to mitigate some of its byproducts.<sup>75</sup>

The perception of inadequate or flawed representative institutions is also a core principle of constitutional design across a range of new democracies.<sup>76</sup> First, it drives a relatively “thick” approach to constitutional drafting. Constitutional framers in new democracies often write lengthy constitutions detailing a large number of rights and delving deep into the details of constitutional structure and functioning. Although some commentators view these kinds of constitutional texts as aberrational or as improper constitutions, they may arguably be a rational reaction to the distrust of democratic institutions.<sup>77</sup> Adopting detailed texts is a way to hem in and limit the power of democratic actors.

Moreover, distrust of democratic institutions leads constitutional designers to create a series of independent institutions designed to check and control elected actors. That is, although judicial review has become a standard institution almost everywhere, constitutional designers in newer democracies have found that judicial review alone is not enough.<sup>78</sup> They thus also create other institutions, like anticorruption commissions, ombudsmen, electoral courts and commissions, human rights commissions, independent prosecutors, independent comptrollers, etc.<sup>79</sup> The proliferation of these institutions is one of the most important—and least studied or understood—trends in constitutional design.<sup>80</sup>

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<sup>74</sup> *Id.* at 16–17.

<sup>75</sup> See, e.g., *infra* note 143 and accompanying text (discussing the South African Constitutional Court’s difficulties operating in a dominant party system).

<sup>76</sup> See *supra* notes 36–57 and accompanying text (discussing the problem of poorly-functioning democracies).

<sup>77</sup> See Kim Lane Scheppele, *Parliamentary Supplements (or Why Democracies Need More Than Parliaments)*, 89 B.U. L. REV. 795, 805 (2009) (noting that modern constitutions are often thick documents, providing a series of restraints on both elected representatives and on the checking institutions themselves).

<sup>78</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 687–88 (2000) (calling on constitutional theorists to think about the possibility for institutions beyond parliaments and courts).

<sup>79</sup> See Scheppele, *supra* note 77, at 823–24 (discussing the different kinds of institutions that are found in modern constitutions in the developing world); cf. Kim Lane Scheppele, *Democracy by Judiciary (or, Why Courts Can Be More Democratic than Parliaments)*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 37–38 (Adam Czarnota et al. eds., 2005) [hereinafter Scheppele, *De-*



According to one scholar, these independent non-judicial institutions act as advisory counterparts to constitutional courts.<sup>81</sup> In other words, they soften the tension between democracy and judicial review by vesting review-like powers in institutions that lack the coercive powers of courts.<sup>82</sup> But in many cases, these non-judicial independent agencies have as sweeping a set of powers (within their designated domain) as constitutional courts. For example, anti-corruption commissions often have full powers to remove and prosecute public officials.<sup>83</sup> Electoral courts and commissions can often take independent action to determine elections and to sanction wrongdoing.<sup>84</sup> Moreover, these independent institutions are often designed in addition to—rather than as a replacement for—an activist constitutional court. This has been the pattern, for example, in systems as diverse as Hungary, India, and Colombia.<sup>85</sup> This suggests that rather than viewing these institutions as a way to weaken the checks placed on democratic officials, they should instead be viewed as an additional manifestation of democratic distrust.

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*mocracy by Judiciary*] (linking the adoption of thick constitutions and the rise of constitutional courts to distrust of democracy in the post-communist states).

<sup>80</sup> See Ackerman, *supra* note 78, at 690 (noting that this area is one where “the creative potential of constitutional law has been egregiously underappreciated”).

<sup>81</sup> See Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 955 (2007) (noting that many of these institutions have purely advisory powers, although others may have some coercive powers). Elmendorf’s classification accurately describes the functioning of some of these institutions, especially in the developed world. See *id.* at 961–64 (discussing National Human Rights Institutions in Europe and elsewhere).

<sup>82</sup> See *id.* at 955.

<sup>83</sup> See JOHN R. HEILBRUNN, WORLD BANK INSTITUTE, ANTI-CORRUPTION COMMISSIONS: PAN-ACEA OR REAL MEDICINE TO FIGHT CORRUPTION? 4 (2004), available at <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>, archived at <http://perma.cc/6VXG-LL78> (noting the extraordinary investigative and coercive powers of the Hong Kong anti-corruption commission over a range of different issues).

<sup>84</sup> See, e.g., Robert A. Pastor, *A Brief History of Electoral Commissions*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 75, 78–79 (Andreas Schedler et al. eds., 1999) (noting the sweeping powers of electoral commissions and courts in Costa Rica and India).

<sup>85</sup> See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 338–39 (2010) (noting that the Colombian Constitution of 1991 created powerful institutions like a Human Rights Ombudsman, as well as a powerful Constitutional Court, because of “a suspicion that existing structures would not adequately enforce the constitution and transform Colombian society”); Robinson, *supra* note 73, at 17 (noting that the founders of Indian democracy “set up a series of independent unelected bodies,” including a national election commission, comptroller, finance commission, auditor general, and public service commissions at all levels of government, as well as a powerful court); cf. Scheppele, *Democracy by Judiciary*, *supra* note 79, at 40 (discussing the role of the Hungarian Constitutional Court as a checking institution as a response to democratic distrust).

## II. CONSTITUTIONAL JURISPRUDENCE AND DYSFUNCTIONAL DEMOCRACIES

The last Part took a sociological look at the attitudes of three sets of relevant actors—judges, scholars, and constitutional designers—and this one looks particularly at the jurisprudence of constitutional courts. The aim here is to show that the conception that exercises of judicial review should be forward-looking and aimed at improving the performance of political institutions through time is relevant to the practices of courts in some fragile democracies. This Part assembles evidence that such a conception exists, and classifies exercises of judicial review into three main camps: efforts to ensure democratic survival,<sup>86</sup> efforts to build up democratic institutions and to fix problems with political systems,<sup>87</sup> and efforts to work around existing political institutions by opening up alternative spaces of democratic contestation.<sup>88</sup> The evidence is again drawn primarily, but not exclusively, from the courts of South Africa, Colombia, and India.

Beyond description and classification, this Part demonstrates that a dynamic perspective on judicial review is helpful in raising questions for evaluating the exercises of judicial review surveyed here.<sup>89</sup> That is, a dynamic perspective on judicial review is not a blank check for courts in the developing world, but instead suggests a different set of limitations on constitutional courts. I treat these questions, and potential responses to them, in a more complete way in Part III.<sup>90</sup>

### *A. Preserving Democracy*

Legal scholars and constitutional designers have envisioned a number of different responses to the threat of democratic erosion. As noted above in Part I, new democracies are often viewed as particularly vulnerable to backsliding into a variant of authoritarianism.<sup>91</sup> I discuss two of these variations here: the militant democracy model,<sup>92</sup> which allows courts to ban problematic parties, and judicial control of the tools of constitutional change.<sup>93</sup> Both of these institutional designs and legal doctrines appear to rest on skepticism about whether maneuvers with significant political or popular support at a given point in time actually reflect the durable popular coalition that should be involved in large-scale political change; in other words, they reflect skepticism about the quality

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<sup>86</sup> See *infra* notes 91–107 and accompanying text.

<sup>87</sup> See *infra* notes 108–150 and accompanying text.

<sup>88</sup> See *infra* notes 152–173 and accompanying text.

<sup>89</sup> See *infra* notes 91–173 and accompanying text.

<sup>90</sup> See *infra* notes 174–254 and accompanying text.

<sup>91</sup> See *supra* notes 17–35 and accompanying text.

<sup>92</sup> See *infra* notes 96–97 and accompanying text.

<sup>93</sup> See *infra* notes 100–106 and accompanying text.

of democracy at the present. The argument is that it is relatively easy for a political force or leader to leverage a temporary spike in popularity and to make it appear to be a durable mandate for sweeping change.<sup>94</sup> Further, certain types of constitutional change can do lasting damage to a political system, putting a regime on a less democratic path indefinitely.<sup>95</sup> Together, these two factors justify extraordinary restrictions on democracy in the present, in the name of preserving and improving it for the future.

The oldest of these mechanisms, the “militant democracy” conception developed in post-war Germany, focuses largely on the banning of parties which pose a threat to the democratic order, a power normally placed in Constitutional Courts.<sup>96</sup> The idea is that parties that are clearly anti-democratic and pursue anti-democratic ends should not be able to come to power from within the democratic order. The model for this practice, of course, is the interwar Weimar Republic, where the Nazis came to power largely using democratic means, beginning as a very small party and gaining strength for their anti-system ideology as the major parties failed to stabilize the economy and government.<sup>97</sup> The key question is whether banning parties is a helpful response for preserving democracy, particularly against the modern threat of democratic backsliding into a competitive authoritarian or hybrid regime. Some evidence—admittedly limited—suggests that it may not be.<sup>98</sup>

More recent work in constitutional theory has focused instead on designing the tools of constitutional change so as to be robust against the threat of abuse.<sup>99</sup> Constitutional designers in recent constitutions have often created tiers of constitutional amendment in the text itself, making certain sensitive pro-

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<sup>94</sup> See, e.g., David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 936 (2013) (noting that in many instances of constitution-making, there is a significant risk that powerful actors will use the moment to entrench their power); William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 196 (2012) (finding, based on a study of Eastern European and post-Soviet states, that certain models of constitution-making “have helped charismatic presidents unilaterally impose authoritarian constitutions on society”); Varol, *supra* note 1, at 433 (arguing that the use of temporary constitutions can ameliorate some of the risks of groups taking advantage of moments of constitutional change to entrench their own power).

<sup>95</sup> See, e.g., Landau, *supra* note 1, at 189; Partlett, *supra* note 94, at 193–96, 237–38 (finding that the shape of constitution-making processes had lasting effects on constitutional orders).

<sup>96</sup> See Issacharoff, *Fragile Democracies*, *supra* note 1, at 1408–09 (describing the militant democracy conception); see also Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, 9 ANN. REV. L. & SOC. SCI. 207, 208–10 (2013) (giving a historical overview of the concept and explaining renewed interest in it).

<sup>97</sup> See, e.g., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 10–13 (1995) (explaining the rise of the Nazi party from within the Constitution of the Weimar Republic).

<sup>98</sup> See *infra* notes 243–247 and accompanying text (discussing the aftermath of Turkey’s attempt to ban parties).

<sup>99</sup> See *infra* notes 100–103 and accompanying text.

visions either particularly difficult or even impossible to change.<sup>100</sup> For example, the Honduran Constitution makes its one-term limit on presidential terms unamendable, and penalizes even proposals to change that provision.<sup>101</sup> Less dramatically, the South African Constitution requires increased super-majorities for some kinds of constitutional changes as opposed to others.<sup>102</sup> One possible purpose of these kinds of tiered provisions is to protect constitutional norms, like term limits, that are particularly likely to be abused and to lead to democratic erosion.<sup>103</sup>

In an increasing number of countries, courts have invented this doctrine on their own, arguing that the “basic structure” or “fundamental principles” of the constitution may not be changed by amending the constitution.<sup>104</sup> This doctrine of unconstitutional constitutional amendments is, for most American lawyers, a stunning display of judicial overreach, but it has been adopted by courts in countries including India, Colombia, Brazil, Pakistan, Bangladesh, Nepal, Portugal, the Czech Republic, Taiwan, and Peru.<sup>105</sup> Uses in Colombia and India suggest that it may have at least limited value in protecting democracy against some kinds of threats.<sup>106</sup>

The case of institutions designed to protect the survival of fragile democracies raises perhaps the most dramatic conflict between traditional constitutional theory and the dynamic approach.<sup>107</sup> Both party-banning and the uncon-

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<sup>100</sup> See Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 708–10 (2010) (noting the use of constitutional tiers that require increasingly more demanding super-majorities for amendment, and recommending this device as an alternative to making some provisions completely unamendable).

<sup>101</sup> See, e.g., Rosalind Dixon & Vicki Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 176–78 (2013) (explaining the design of the Honduran Constitution and its role in provoking a constitutional crisis and military coup in 2009).

<sup>102</sup> See S. AFR. CONST., 1996, art. 74 (requiring that most amendments receive only a two-thirds majority of Parliament and, in some cases, super-majority approval of the National Council of Provinces, but requiring a three-quarters majority of Parliament for amendments to Chapter 1 of the Constitution).

<sup>103</sup> This was precisely the use of the unamendable provision in Honduras. See Dixon & Jackson, *supra* note 101, at 176–78.

<sup>104</sup> See, e.g., Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 659 (2013) (noting that the issue of unconstitutional constitutional amendments has already been litigated in “numerous countries”).

<sup>105</sup> See *id.* at 677–99 (giving an overview of usage across a broad range of countries).

<sup>106</sup> See, e.g., Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment 1–3* (unpublished manuscript), archived at <http://perma.cc/X4PW-P2TM>.

<sup>107</sup> There are yet more dramatic examples of such a conflict. Some scholars have suggested a constitutional role for the military as a protector of democratic stability in fragile regimes. See Ozan O. Varol, *The Military as the Guardian of Constitutional Democracy*, 51 COLUM. J. TRANSNAT’L L. 547, 547 (2013) (arguing that militaries can at times promote rather than hinder democratic development in fragile regimes). The key to the logic is the observation that a military role in the constitutional order need not be antithetical to democracy; under some conditions militaries have promoted de-

stitutional constitutional amendments doctrine are very difficult to square with most standard approaches to constitutional theory, because they involve extraordinary restrictions on the democracy of the present. The “militant democracy” model of party banning reduces the scope of political competition and prevents some political forces from contesting political office. And the unconstitutional constitutional amendments doctrine prevents even large supermajorities from carrying out certain political changes without either packing the court or, perhaps, by conducting a wholesale constitutional replacement. But both emerge as potentially vital tools to protect and preserve the democracy of the future; thus a dynamic perspective emerges as the best potential defense of both doctrines.

### *B. Insider Strategies: Working to Improve Democratic Institutions*

Beyond preserving democracy, some courts also focus on improving the performance of democratic institutions through time. The sheer number of possible approaches makes it impossible to give a complete accounting here. Instead, this Section focuses on giving examples of approaches that have been used in two well-studied constitutional courts: (1) the Colombian Constitutional Court, which has focused on problems found in a non-institutionalized party system with a correspondingly overreaching executive,<sup>108</sup> and (2) the approaches of the South African Constitutional Court, which has focused on problems found within a dominant-party system.<sup>109</sup>

#### 1. Colombia and Deinstitutionalized Party Systems

The Colombian Constitutional Court is faced with an arguably de-institutionalized party system.<sup>110</sup> Parties are weak, turn over frequently, and lack clear policy platforms.<sup>111</sup> Further, the Colombian Congress is widely viewed as corrupt, with legislators more interested in achieving personal gain for them-

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mocratization. The military may in fact be especially effective at defending against threats of democratic erosion from within: judicial decisions may be ignored (or judiciaries packed), but military power is much more difficult to evade. *See id.* at 579–80 (noting that judicial decisions can more easily be ignored). Turkey, where the military had a long history of stepping in to protect the democratic order against the perceived threat of Islamist political forces, is often held up as a model for this type of constitutional design. *See id.* at 597–605; *see also* Ozan O. Varol, *The Turkish “Model” of Civil-Military Relations*, 11 INT’L J. CONST. L. 727, 727 (2013) (critically examining moments where the Turkish military has played a pro-democratic versus anti-democratic role in Turkish politics).

<sup>108</sup> *See infra* notes 110–138 and accompanying text.

<sup>109</sup> *See infra* notes 139–150 and accompanying text.

<sup>110</sup> *See, e.g.*, Leongómez, *supra* note 43, at 80 (stating that the Colombian party system was going through a “rapid de-institutionalization process”).

<sup>111</sup> *See id.* at 83–85.

selves or their backers than in pursuing national policy initiatives.<sup>112</sup> The result of these two factors has been a Congress that is very weak in carrying out the core functions of lawmaking or checking executive power. This legislative weakness is matched by a correspondingly very powerful president that is largely unchecked by other elected officials.<sup>113</sup> The Court and other actors within the political system, broadly speaking, have taken two approaches to these mirror-image problems. First, they have sought to improve the performance of the weaker institution (the Congress) by cleansing it and by attempting to force it to become more interested in policy.<sup>114</sup> Second, they have sought to close the accountability gap by essentially replacing the congressional role in checking an overreaching executive.<sup>115</sup>

Colombian institutions have, first, responded to the perceptions of corruption in the Colombian system in the simplest way imaginable: by seeking to oust corrupt or incompetent officials.<sup>116</sup> The Colombian Constitution includes a number of institutions aimed at removing and jailing politicians, particularly legislators, which are perceived by the population as hopelessly corrupt and ineffective. A *Procuraduría* (Attorney General) has the power to discipline, remove, and impose future political bans on elected and non-elected actors for a wide range of faults.<sup>117</sup> The Prosecutor's Office has the power to recommend criminal charges to the Criminal Chamber of the Supreme Court, which can jail high officials.<sup>118</sup> The Comptroller audits state institutions regularly and broadly.<sup>119</sup> Other constitutional designs in new democracies tend to have similarly robust sets of institutions charged with cleansing politics.<sup>120</sup>

These control institutions have had an incredible impact on Colombian politics: in the 2006–2010 term, about one-third of all elected congressmen were investigated and over fifteen percent actually jailed for their links to paramilitary groups.<sup>121</sup> Most of these investigations were based on allegations of links or dealings with paramilitary groups. Moreover, the theories of removal

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<sup>112</sup> See *id.* at 91–93 (explaining how the de-institutionalized party system and other factors impact the behavior of the Colombian Congress).

<sup>113</sup> See, e.g., Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 DEMOCRATIZATION, no. 4, 2003, at 51–52 (emphasizing the extent to which Colombian Presidents have historically ruled by using their emergency powers).

<sup>114</sup> See *infra* notes 116–124 and accompanying text.

<sup>115</sup> Uprimny, *supra* note 113, at 53–60 (discussing the Court's attempts to check presidential emergency powers).

<sup>116</sup> See *infra* note 117 and accompanying text.

<sup>117</sup> See CONSTITUCIÓN POLÍTICA DE COLOM. [C.P.] arts. 275–278.

<sup>118</sup> *Id.* arts. 249–251.

<sup>119</sup> *Id.* arts. 267–268.

<sup>120</sup> See, e.g., Scheppele, *supra* note 77, at 823–24 (giving examples of a number of different types of cleansing institutions).

<sup>121</sup> See Claudia López & Óscar Sevillano, *Balance político de la parapolítica*, ARCANOS, Dec. 2008, at 62, 62–66 (Colom.), available at [http://www.arcoiris.com.co/wp-content/uploads/2011/arcanos/revista\\_ARCANOS\\_14.pdf](http://www.arcoiris.com.co/wp-content/uploads/2011/arcanos/revista_ARCANOS_14.pdf), archived at <http://perma.cc/HPG6-4HAG>.

extend well beyond criminal matters and outright corruption. In 2013, for example, the national Attorney General utilized his broad powers to remove the elected mayor of Bogotá, Gustavo Petro, on the grounds that Petro had handled a proposed shift from private to public garbage vendors in an incompetent manner.<sup>122</sup> Petro was also banned from future participation in politics for fifteen years. Importantly, the allegations against Petro were not based on corruption, but on poor performance.<sup>123</sup> Although the national President later reinstated Petro, some commentators in the aftermath of the removal referred to the national Attorney General—an unelected institution charged with monitoring politicians and bureaucrats—as the most powerful person in the country.<sup>124</sup>

Beyond cleansing, the Court and its allied institutions have also sought to improve the legislative performance of the Congress. For example, they have imposed strict limits on the kind of lawmaking power that the Congress can delegate to the President, a species of non-delegation doctrine.<sup>125</sup> Similarly, the Colombian Court has attempted to improve the quality of legislative deliberation by constitutionalizing some issues of legislative procedure. When the legislature fails to debate a key issue at all stages of debate, for example because a provision is added as part of an amendment very late in the legislative process, the Court will strike down the resulting law.<sup>126</sup>

A textbook example of the Court's attempts to "fix" the Congress came out of the critically-important 2003 case *C-816/04*, where the Colombia Constitutional Court examined the constitutionality of, and struck down, a legislative amendment that formed part of then-President Uribe's signature program on national security.<sup>127</sup> The amendment would have allowed Uribe to enact

<sup>122</sup> See William Newman, *Mayor Ousted in Colombia After Claims of Bungling*, N.Y. TIMES, (Dec. 9, 2013), at A6, available at <http://www.nytimes.com/2013/12/10/world/americas/mayor-ousted-in-colombia-after-claims-of-bungling.html>, archived at <http://perma.cc/CD2U-F47C>.

<sup>123</sup> See *id.* (noting that the core allegation was that Petro had made "serious mistakes in his handling of the botched transfer of garbage collection from private contractors to a government-run service").

<sup>124</sup> See Ordóñez, *¿el hombre más poderoso de Colombia?*, SEMANA (Dec. 10, 2013, 12:00 AM), <http://www.semana.com/nacion/articulo/ordonez-es-el-hombre-mas-poderoso-de-colombia/367790-3>, archived at <http://perma.cc/B7ZN-M3CL> (Colom.).

<sup>125</sup> The core tool here is a requirement that delegations be relatively precise. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], febrero 11, 2003, Sentencia C-097/03, available at <http://www.corteconstitucional.gov.co/relatoria/2003/c-097-03.htm>, archived at <http://perma.cc/G5V-4SKW>.

<sup>126</sup> This is called the "elusion of debate" doctrine. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2004, Sentencia C-754/04, § VII, available at <http://www.corteconstitucional.gov.co/relatoria/2004/c-754-04.htm>, archived at <http://perma.cc/LC8P-3PWD> (striking down parts of an important bill reducing pension payouts).

<sup>127</sup> See Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, available at <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm>, archived at <http://perma.cc/7N7-7NG5>; see also Gonzalo A. Ramírez Cleves, *El control material de las reformas constitucionales mediante acto legislativo: A partir de la jurisprudencia establecida en la Sentencia C-551 de 2003*, 18 REVISTA DERECHO DEL ESTADO 3, 17–18 (2006), available at <http://dialnet.unirioja>.

sweeping anti-guerrilla measures. The Court struck the amendment down on procedural grounds, holding that its passage through the Congress had been improper. It focused on the fact that the President appeared to have interfered in the congressional procedure for passage of the law. The Court noted that the amendment was about to fail a key vote, but the presiding officer in Congress (an Uribe ally), after trying to keep voting open for an extraordinary length of time, closed the legislative session on grounds that there was a disturbance on the house floor and refused to certify that a vote had been held.<sup>128</sup> After a one-day delay, the Congress held a new vote without any additional deliberation, and fourteen legislators changed their votes.<sup>129</sup> The obvious inference was that the President intervened in the congressional deliberations and used his control over state patronage to secure the necessary votes. The Court held that these irregularities were improper because they had “distorted the popular will” and violated the principle that the Congress “should be” a “space of public reason.”<sup>130</sup>

At other times the Court has focused on limiting the powerful Colombian presidency more directly. For example, a key line of cases attempts to rein in the unilateral presidential use of emergency powers, requiring that most initiatives be undertaken through the ordinary lawmaking process.<sup>131</sup> In particular, the Court has held that “chronic,” long-term problems may not be dealt with through emergency mechanisms, which instead are limited to truly unforeseen events like earthquakes and other natural disasters.<sup>132</sup> As a result, most important policy problems can no longer be dealt with by the President unilaterally, a striking change from only a few decades earlier when the country was nearly always under some kind of state of emergency.<sup>133</sup>

The Court has also stepped in to mediate the relationship between President and voters. In another key case during President Uribe’s term, the Court

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es/descarga/articulo/3405301.pdf, archived at <http://perma.cc/RV2R-3FJ3> (analyzing C-816/04 and its context in detail).

<sup>128</sup> See *Sentencia C-816/04*, §§ VI.32–.34.

<sup>129</sup> See *id.* at § VI.61.

<sup>130</sup> *Id.* at §§ VI.109, .138.

<sup>131</sup> For an overview of the relevant case law, see Uprimny, *supra* note 113, at 53–60. For a comparison of constitutional theory on presidential emergency powers in the United States, see generally Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551 (2011).

<sup>132</sup> See, e.g., Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2010, *Sentencia C-252/10*, §§ IV.2.3.3, VI.5.a, available at <http://www.corteconstitucional.gov.co/relatoria/2010/c-252-10.htm>, archived at <http://perma.cc/R3PE-79W6> (striking down an attempt to declare a state of Economic, Social, and Ecological emergency to deal with long-running fiscal and administrative issues in the healthcare sector, because “a jurisprudential tradition . . . has considered the employment of states of exception improper in order to improve chronic or structural problems”) (author’s translation).

<sup>133</sup> In particular, the country spent 82.1% of the time under some sort of state of emergency or state of siege between 1970 and 1991, but only 17.5% of the time under such a state between 1991 and 2002. See Uprimny, *supra* note 113, at 65 tbl.3.



struck down a series of referendum questions involving a package of constitutional reforms on the grounds that the questions were misleading and/or presented in a way that they were likely to deceive voters. For example, the questions included introductory notes that explained a given measure to criminalize drug possession as designed “to protect Colombian society, particularly its infants and young people.”<sup>134</sup> Further, the Court held that voters could not be allowed to vote on all question as a block because that would turn the referendum into a “plebiscite” on the President rather than a consideration of a diverse set of questions.<sup>135</sup> The Court thus struck down parts of the proposed referendum while allowing other pieces to go to the voters.<sup>136</sup>

Finally, the Court at times has sought to prop up other control institutions in order to make them more effective at their tasks of checking the executive. In comparative terms, this seems to be a common and important—but overlooked—function of judicial review: courts can improve the position of their allied institutions rather than working directly against institutions that pose a threat to democracy.<sup>137</sup> The Colombian Court, for example, has drafted institutions like the National Ombudsman and Attorney General’s Office into its large-scale structural cases involving internally displaced persons, making these institutions both monitors of the executive bureaucracy and sources of information about future policy ideas.<sup>138</sup> These kinds of measures help to give institutions (other than the Court itself) leverage over the bureaucracy, arguably increasing accountability.

<sup>134</sup> See Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, § VI.139, available at <http://www.corteconstitucional.gov.co/relatoria/2003/c-551-03.htm>, archived at <http://perma.cc/Y3XW-XKG7> (author’s translation). Similarly, a question on pension reform was introduced by asking whether voters would approve “a measure designed to reduce social inequalities and control public spending.” See *id.* at § VI.138 (author’s translation).

<sup>135</sup> See *id.* §§ VI.197–198.

<sup>136</sup> Of the fifteen questions allowed to go to voters, only one was approved by the requisite number of voters. See *Colombia: confirmada derrota en referendo*, BBCMUNDO.COM (Jan. 3, 2004, 5:51 GMT), [http://news.bbc.co.uk/hi/spanish/specials/2003/balance\\_2003/newsid\\_3364000/3364751.stm](http://news.bbc.co.uk/hi/spanish/specials/2003/balance_2003/newsid_3364000/3364751.stm), archived at <http://perma.cc/D3AY-WJ2C>.

<sup>137</sup> See *infra* notes 147–150 and accompanying text (showing the same strategy in South Africa); see also Kim Lane Scheppele, *How to Evade the Constitution: The Case of the Hungarian Constitutional Court’s Decision on the Judicial Retirement Age*, EUTOPIA LAW (Aug. 8, 2012), <http://eutopialaw.com/2012/08/08/how-to-evade-the-constitution-the-case-of-the-hungarian-constitutional-courts-decision-on-the-judicial-retirement-age/>, archived at <http://perma.cc/RUR2-EM9Y> (describing a Hungarian Constitutional Court decision attempting to defend the independence of the ordinary judiciary).

<sup>138</sup> See, e.g., Corte Constitucional [C.C.] [Constitutional Court], enero, 22, 2004, Sentencia T-025/04, available at <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>, archived at <http://perma.cc/7U7G-XC7A> (Colom.) (requiring that the authorities submit monthly reports to the national Ombudsman and national Attorney General in compliance with a structural decision involving internally displaced persons).

## 2. South Africa and the Problem of Dominant Parties

As many commentators have noted, courts working in a dominant-party system like the one in South Africa face particular challenges. The African National Congress (ANC), as the party that led the country's transition out of apartheid, holds a firm grip on political institutions.<sup>139</sup> It is not a monolithic entity, but it is a powerful force that is in no danger of losing national elections.<sup>140</sup> These dominant-party systems pose special risks to democratization. The absence of political competition may weaken the quality of political institutions, and groups who do not form part of the dominant coalition may find themselves permanently frozen out of power.<sup>141</sup>

The South African Court is a constrained actor—the very existence of a dominant party at the center of South African politics puts strict limits on what the Court can do.<sup>142</sup> For example, the Court's weak jurisprudence concerning the political rights of opposition members stands as an exception to the Court's broader independence from the dominant ANC.<sup>143</sup>

Still, besides core issues of political rights, the Court has aimed to improve the quality of democratic institutions by working on some of the characteristic problems with dominant-party systems. At times, the Court has been able to exploit intra-party splits within the ANC, helping to strengthen the voice of groups that might otherwise have been marginalized.<sup>144</sup> The famous 2002 socioeconomic rights case *Minister of Health v. Treatment Action Campaign* might be explicable on these terms: after a faction of the ANC (including the incumbent President) came out against the availability of drugs that had complete effectiveness at preventing the spread of HIV in pregnant women from parent to child, the South African Constitutional Court handed down a

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<sup>139</sup> See, e.g., Hermann Giliomee et al., *Dominant Party Rule, Opposition Parties and Minorities in South Africa*, 8 DEMOCRATIZATION, no. 1, 2001, at 161 (describing the South African system as a dominant party system).

<sup>140</sup> See *id.* at 172–73 (noting that the ANC is a factionalized party with important intra-party factions).

<sup>141</sup> See Giliomee & Simkins, *supra* note 50, at 1, 40–41.

<sup>142</sup> See Issacharoff, *Constitutional Courts*, *supra* note 1, at 997–99; Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 111 (2009) (noting that the Court concentrates on managing its relationship with the dominant ANC and the political branches, rather than seeking to build direct public support).

<sup>143</sup> See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT 1995–2005*, at 334–35 (2013) (arguing that because of the presence of the ANC, “the role of constitutional courts in opening up the democratic system to marginalised groups, which is the role that seems most easily justifiable in a mature democracy, is precisely the role that the . . . Court found hardest to perform”).

<sup>144</sup> See Giliomee et al., *supra* note 139, at 172–73 (noting that some factions within their party use their power to repress other factions).

decision requiring that the drugs be made widely available.<sup>145</sup> The decision helped to empower leftist factions within the ANC who had been marginalized by the President and who supported the broader availability of the drugs.<sup>146</sup>

Second, as in the case of Colombia, the Court has at times taken actions to prop up other institutions that are needed to provide accountability.<sup>147</sup> For example, in a pair of recent decisions, the Court imposed limits on the ANC's ability to assert control over an independent institution, the National Prosecution Authority, charged with investigating cases of political corruption.<sup>148</sup> In one case, the Court struck down the President's attempt to appoint a candidate who had attempted to undermine an investigation into another official facing criminal charges; the Court held that the President had not rationally considered all relevant factors.<sup>149</sup> In another case the Court struck down reforms that would have given many of the National Prosecution Authority's powers to the police.<sup>150</sup>

### *C. Outsider Strategies: Working Around Democratic Institutions*

In contrast to the "insider" strategies of the previous section, where courts seek to improve democratic institutions, is a set of "outsider" strategies where courts work to build up democracy by working around those institutions. In other words, courts sometimes work directly to build up civil society and to spread constitutional culture. Although these approaches have been largely ignored in the literature, they appear to be commonly used in new democracies.

The core aim of the "outsider" strategy is to set up alternative forums for democratic deliberation which bypass traditional democratic institutions.<sup>151</sup> This process is especially appealing in environments with poorly functioning democratic institutions because it requires less direct involvement with those institutions and does not require that courts be as tethered to the slow process

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<sup>145</sup> See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 135, available at <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>, archived at <http://perma.cc/Z9J4-U3C4>.

<sup>146</sup> See, e.g., ROUX, *supra* note 143, at 292–303 (discussing the success of the Treatment Action Campaign against the position of the dominant ANC).

<sup>147</sup> See *supra* notes 137–138 and accompanying text.

<sup>148</sup> See *Democratic Alliance v. President of the Republic of South Africa* 2013 (1) SA 248 (CC), available at <http://www.saflii.org/za/cases/ZACC/2012/24.pdf>, archived at <http://perma.cc/U9NZ-YE34>; *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC), available at <http://www.saflii.org/za/cases/ZACC/2011/6.pdf>, archived at <http://perma.cc/4CS6-62DC>.

<sup>149</sup> See *Democratic Alliance* (1) SA 248 (CC) paras. 55, 57, 86.

<sup>150</sup> See *Glenister* (3) SA 347 (CC) paras. 1, 2, 251. For an in-depth discussion of this decision in context, see Mark S. Kende, *Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers*, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 35, 43–45 (2014).

<sup>151</sup> See, e.g., *infra* notes 152–154 and accompanying text (discussing the Colombian Constitutional Court's attempts to resolve social and economic problems that the legislature failed to resolve).

of institutional reform. That is, although courts are dependent on a “support structure,” including civil society support and a strong constitutional culture, to carry out their goals, the strategies explored in this section flip that narrative, demonstrating how courts can take steps to influence both variables.<sup>152</sup> This Section briefly draws on examples from India and Colombia to illustrate the point.

Both India and Colombia have experimented with structural injunctions to build up civil society groups and give these groups leverage over the state. The Colombian Constitutional Court established continuing jurisdiction over cases involving internally displaced persons or internal refugees in 2004, and did the same in a case involving the healthcare system in 2008.<sup>153</sup> The internally displaced persons case involved the state’s failure to develop any real public policy to deal with about three to four million Colombians who had to leave their homes and relocate to different parts of the country because of Colombia’s ongoing civil violence. The Court declared a “state of unconstitutional conditions” and began issuing detailed follow-up orders to the state on a range of issues as diverse as housing, access to job training, and restitution for lost property.<sup>154</sup> The healthcare case involved the Court’s attempt to fix basic structural problems in a troubled system that is used by nearly the entire population of the country. In particular, the Court held that there were systematic problems involved in the package of benefits received by poorer Colombians and in the way the system was financed.<sup>155</sup>

The key point here is the model used by the Court. First, the Court created civil-society commissions charged with monitoring bureaucratic performance and with formulating policy ideas.<sup>156</sup> The commission in the internally displaced persons case is composed of groups representing displaced persons themselves, domestic and international NGOs, and other experts in law, public

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<sup>152</sup> See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 11–25 (1998) (discussing the roles that courts, culture, and political structures play in establishing rights revolutions).

<sup>153</sup> See Corte Constitucional [C.C.] [Constitutional Court], julio, 31, 2008, Sentencia T-760/08, available at <http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm>, archived at <http://perma.cc/8E2W-6EAG> (Colom.) (healthcare); Sentencia T-025/04 (internally displaced persons). On the continuing jurisdiction of the Court across both cases, see César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1669–71, 1675 (2009).

<sup>154</sup> For a detailed description of the key follow-up orders, see CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA* 82–90 (2010).

<sup>155</sup> See Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 191–92 (2013).

<sup>156</sup> See Rodríguez-Garavito, *supra* note 153, at 1685–86.

policy, sociology, and related disciplines.<sup>157</sup> Second, the Court has held regular public hearings, which are generally televised and widely covered by the media.<sup>158</sup> These hearings are attended by members of the civil society commissions, control institutions, members of Congress, and the state officials themselves, and force the members of the state to account for their progress (or lack thereof) in front of the commissions and institutions charged with monitoring them.

Further, the Court has retained jurisdiction and relied on a model of issuing repeated follow-up orders to deal with discrete parts of the two massive structural cases they have taken up. The Court's orders are based on feedback—in other words, on an assessment of the state's progress in achieving the Court's goals. The civil society commissions and control institutions play a key role in monitoring state compliance and also in suggesting policy ideas and the design of particular orders to the Court. The system of statistical indicators that the Court demanded be set up as a starting point for evaluating the magnitude of the problem of internally displaced persons is an example of such a policy idea.<sup>159</sup> The state and the civil society commission each proposed a battery of indicators along a range of issues like the access of the displaced to healthcare, food, employment opportunities, etc., and the Court largely adopted the measures of the commission.<sup>160</sup>

The Indian Supreme Court at times has acted in a very similar way. In 2001, for example, the Court declared a structural interdict involving the right to food in India, over which it continues to retain jurisdiction.<sup>161</sup> The Court found that there were sweeping problems with respect to the access of the poor to food in India, and has since issued a series of wide-ranging orders in all In-

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<sup>157</sup> For a list of the Monitoring Commission's members, see COMISIÓN DEL SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, 5 PROCESO NACIONAL DE VERIFICACIÓN: EL RETO ANTE LA TRAGEDIA HUMANITARIA DEL DESPLAZAMIENTO FORZADO: REPARAR DE MANERA INTEGRAL EL DESPOJO DE TIERRAS Y BIENES 13–14 (2009), available at <http://www.codhes.org/~codhes/images/Encuestas/Vol%205%20Reparar%20de%20manera%20integral%20Tierras.pdf>, archived at <http://perma.cc/FY8B-6S54>.

<sup>158</sup> See Rodríguez Garavito, *supra* note 153, at 1669 (describing such a hearing in June 2009 on the internally displaced persons case).

<sup>159</sup> See, e.g., Corte Constitucional [C.C.] [Constitutional Court], noviembre 11, 2006, Auto 337/06, available at <http://www.corteconstitucional.gov.co/T-025-04/AUTOS%202006/32.%20Auto%20del%2027-11-2006.%20Auto%20337.%20Indicadores%20de%20resultado.pdf>, archived at <http://perma.cc/JXC9-UGH3> (issuing orders pursuant to Sentencia T-025/04); Corte Constitucional [C.C.] [Constitutional Court], agosto 11, 2006, Auto 218/06, available at <http://www.corteconstitucional.gov.co/T-025-04/AUTOS%202006/26.%20Auto%20del%2011-08-2009.%20Auto%20218.%20Verificacion%20medidas.PDF>, archived at <http://perma.cc/C4CC-GVH8> (same).

<sup>160</sup> See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 227 n.201 (2012).

<sup>161</sup> For a list of ongoing orders in the case through 2012, see *Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN, <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders>, archived at <http://perma.cc/3FD8-G5RX> (last visited Oct. 15, 2014).

dian states.<sup>162</sup> These orders have required, for example, the creation of programs to give grain to poor families, allowing poor workers to act in work-for-food programs, and to give schoolchildren access to lunch during the school day.<sup>163</sup> The Court set up a Commission to monitor compliance and to make policy recommendations, and the Commission consults widely with civil society groups, viewing them as a key source of policy and compliance information.<sup>164</sup> In particular, the Commission has worked very closely with the Right to Food Campaign, a network of civil society groups that helped to launch the litigation.<sup>165</sup> The Campaign itself holds regular public hearings throughout the country in an effort to raise awareness about the problem.<sup>166</sup>

At their best, these cases may achieve two different goals. The first is strengthening civil society in contexts where it has historically been weak. The courts provide an incentive for civil society to organize by giving them a central message to organize around, an institutional structure through which they can influence policy, and a public forum in which to air their grievances. At the same time, they increase the leverage of civil society by forcing the state bureaucracy to pay attention to their policy ideas. The second goal is spreading constitutional culture, again in contexts where it has historically been weak. Courts do this chiefly by publicizing important constitutional issues (through the use of public hearings and similar devices) and by demonstrating that these issues need to be taken seriously.

Civil-society building and the spreading of constitutional culture are also achievable outside of the confines of structural cases. For example, one could consider the broader strategies of the Indian and Colombian courts to radically expand access to constitutional justice. The Indian Supreme Court deliberately undertook a campaign of public interest litigation and as part of that campaign made access to the courts extremely easy.<sup>167</sup> For example, it relaxed standing rules to allow NGOs and similar groups to sue on behalf of others when issues involved the public interest, and accepted informal petitions—like handwritten letters—as sufficient to start a dispute.<sup>168</sup>

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<sup>162</sup> For an overview of this sprawling case and its major orders, see generally Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691 (2010).

<sup>163</sup> See *id.* at 700.

<sup>164</sup> The Commission more closely resembles the United States “special master”—the commissioners are a pair of legal experts rather than a confluence of civil society groups. See *id.* at 726 (explaining that the commission is staffed by two experts).

<sup>165</sup> See *id.* at 719–26 (explaining how the campaign works to establish grassroots support, publicize the issue, and to pressure different levels of the state bureaucracy).

<sup>166</sup> See *id.* at 724.

<sup>167</sup> See, e.g., Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 497–98 (1989).

<sup>168</sup> See P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANS-NAT'L L. 561, 570–71 (1985).

The Colombian Court, similarly, has relaxed standing rules for individual constitutional complaints and allowed recourse to the Court through very informal means.<sup>169</sup> Moreover, the Court has engineered its substantive rules in ways that invite claims. For example, in the first decade of the Court's existence it shifted away from a model in which very poor citizens could access the Court for socioeconomic rights claims only in unusual circumstances, towards a model in which the Court became a workhorse for middle-class claims seeking access to healthcare treatments or larger pensions.<sup>170</sup> Such claims now make up half or more of the Court's total docket.<sup>171</sup>

These attempts to expand access to the court might again be defended in part as "outsider" strategies: the allowance of broad standing for groups to represent public-interest issues, for example, might be seen as an attempt to encourage the formation and activism of civil society groups across a range of issues. The broader strategy of courts making themselves a focal point for policy-making on a range of issues could be seen as a long run strategy to increase the importance of constitutional values in everyday life. The Colombian strategy of using constitutional litigation to adjudicate mundane socioeconomic rights issues, for example, has made the Colombian individual complaint perhaps the best-known instrument in the country's legal system.<sup>172</sup>

As with judicial interventions designed to improve the performance of political institutions, some of the interventions catalogued here could be defended through the traditional tools of constitutional theory. But the dynamic perspective is useful in highlighting a productive set of questions. Critics of the large-scale structural interventions in India and Colombia commonly critique them as the taking on of essentially legislative tasks, or in other words as overstepping proper conceptions of judicial role.<sup>173</sup> The dynamic perspective suggests

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<sup>169</sup> See, e.g., Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 552–54 (2004) (explaining that the Colombian individual complaint, the *tutela*, may be filed by informal means).

<sup>170</sup> See Pablo Rueda, *Legal Language and Social Change During Colombia's Economic Crisis*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 25, 32–41 (Javier A. Couso et al. eds., 2010) (tracing the shift in meaning from the Court's creation in 1991 to an economic crisis in the late 1990s).

<sup>171</sup> See, e.g., DEFENSORÍA DEL PUEBLO, LA TUTELA Y EL DERECHO A LA SALUD 2012, at 111 tbl.2 (2013) (Colom.), available at <http://gestarsalud.com/logrosycriterios/images/PDF/tuteladerechosalud2012.pdf>, archived at <http://perma.cc/5JD8-SQHZ> (showing that in both 2011 and 2012, healthcare together with other socioeconomic rights made up well more than half of all individual complaints filed in the country).

<sup>172</sup> See César A. Rodríguez et al., *Justice and Society in Colombia: A Sociological Analysis of Colombian Courts*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICAN AND LATIN EUROPE 134, 159–62 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) (presenting data about the importance and ubiquitous nature of the *tutela* in the country's legal culture).

<sup>173</sup> See, e.g., Landau, *supra* note 85, at 357–58 (giving some of the critiques of the Colombian Court's structural jurisprudence).

that the right question to be asking may be a different one: what is the long-run effect of a strategy that seeks to build up alternative sources of democracy outside of elected institutions? Do these efforts tend to strengthen or weaken democratic institutions over time? I take up these questions in more depth in Part III.

### III. FITTING PRACTICE AND CONSTITUTIONAL THEORY

What is the relevance of the sociological and legal practices surveyed in Parts I and II for a constitutional theory of judicial role? This Part attempts to answer that question by arguing that the most defensible theory built off of these foundations is one where judges seek to improve the functioning of democratic institutions through time.<sup>174</sup> This places the judicial role in new or more fragile democracies in an interesting place: it is not a wholly different enterprise from judging in established democracies, but the sense of role does have different points of emphasis noted in this Part. Further, judging under such a conception is not a free-for-all; instead, judicial action needs to be justified with reference to the implications and challenges of the theory. Finally, a cautionary note: the effort here is not one to build an optimal theory from the ground up, but instead to construct the most reasonable justification from existing practice.<sup>175</sup> The main hope is that such a theory, although eliding some normative questions, will be useful to the actors themselves in clarifying key issues.

#### *A. Constitutional Theory and Democratic Dysfunction*

Some recent work has contested the relevance of “Northern” constitutional theory and separation of powers to judging in the “Global South.”<sup>176</sup> Despite this, it is unlikely that existing works of constitutional theory are truly inapposite, if for no other reason than their internal diversity. There is no standard answer to questions of judicial role, but instead a series of different approaches. Similarly, theories and practices of the separation of powers have varied tremendously across time and across countries. To take an obvious example, the kind of activism that was acceptable at the height of the Warren Court’s powers in the United States would be unlikely to pass muster among most federal courts today.

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<sup>174</sup> See *infra* notes 176–254 and accompanying text.

<sup>175</sup> For a justification of this kind of approach to constitutional theory, see generally Garrick B. Pursley, *Thinning Out Structural Theory* (Mar. 7, 2014) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2405983](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405983), archived at <http://perma.cc/9BMX-KVWS>.

<sup>176</sup> See David Bilchitz, *Constitutionalism, the Global South, and Economic Justice*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH, *supra* note 4, at 41, 41–42.



A more helpful approach breaks constitutional theory down into different sets of challenges and responses, as this Part does here in a partial survey.<sup>177</sup> Most work in the United States, for example, has started from some variant of the counter-majoritarian difficulty, or the problem of justifying judicial interventions in the face of electoral majorities.<sup>178</sup> A significant strain of this work argues that Courts are often said to lack the legitimacy and the capacity to make decisions that are better left to elected officials. In the traditional formulation by James Bradley Thayer, a court should not substitute its own judgment for that of nationally-elected officials unless it clearly believes that they are not “reasonable.”<sup>179</sup> Modern Thayerians are often “popular constitutionalists”, arguing that the determination of constitutional meaning is properly left to the public or to their elected representatives, rather than to the court.<sup>180</sup> In the clearest and most extreme formulation, judicial review is unjustifiable in well-functioning democratic systems.<sup>181</sup>

The restraint-based vein of scholarship seems to be difficult to apply to the problematic democracies studied in this paper. In other words, the case against judicial review requires the assumption of democratic institutions “in reasonably good working order.”<sup>182</sup> The case for unelected judges deferring to democratic resolution of contested issues breaks down unless democratic institutions function at a reasonable level. Similarly, the case for deference by judiciaries in order to allow constitutionalism to flourish within the political system—what has been called political constitutionalism—depends on “a widespread commitment among the nation’s citizens to constitutional values.”<sup>183</sup> In systems with strong constitutional cultures, it is plausible that political actors will take constitutional principles seriously, because voters will otherwise punish them. But in systems without strong constitutional cultures, there is no ob-

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<sup>177</sup> For a recent map of many of the positions outlined here, see generally Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 372 (2012).

<sup>178</sup> For the classic formulation, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority but against it.”).

<sup>179</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151 (1893).

<sup>180</sup> See, e.g., TUSHNET, *supra* note 59 (calling for a “populist constitutional law” outside of the courts).

<sup>181</sup> See Waldron, *supra* note 2, at 1348 (“[J]udicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society.”).

<sup>182</sup> *Id.* at 1362. Waldron is clear that the assumption of well-functioning democratic institutions is not an assumption of perfect institutions, nor necessarily of substantively just outcomes. See *id.* at 1362–63. But his case does seem to rule out substantial deviations from liberal democracy along the lines studied in this article.

<sup>183</sup> Tushnet, *supra* note 3, at 2255.

vious basis for the assumption that political institutions will take constitutional values seriously. Judicial restraint might still be the best prescription in these democracies, but it would need to be justified in some other way. As explained below, the dynamic feedback effects of judicial action on the political system may serve as a related, alternative justification for judicial restraint.<sup>184</sup>

Other veins of constitutional scholarship are not necessarily inapplicable. For example, another major argument in the United States tradition seeks to justify judicial review despite the counter-majoritarian difficulty, sometimes by claiming that it is actually pro-democratic rather than anti-democratic. The best-known formulation is John Hart Ely's political process theory, which has spawned a massive follow-up literature elaborating on and critiquing his claims. Ely's core claim is that judicial review can be justified if courts help to reinforce democratic representation and increase participation, primarily by increasing access to the political system for minority groups that are systematically excluded from it.<sup>185</sup> Ely, of course, envisioned his theory as a justification for the decisions of the Warren Court in the United States and their impact on African-Americans, primarily with a view towards civil-rights era jurisprudence. But his theory has broader resonance in comparative constitutional law as a possible justification for judicial action.<sup>186</sup>

Finally, recent scholarship within the United States has revived an old tradition by arguing that judicial action is normally majoritarian, not counter-majoritarian, and thus that the central challenge is actually justifying majoritarian exercises of judicial review.<sup>187</sup> Political scientists have used empirical evidence to challenge the view that United States judicial review is in fact counter-majoritarian: they find instead that the Court has tended to support majoritarian views over the long haul.<sup>188</sup> Recent normative work proposes that the

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<sup>184</sup> See *infra* notes 193–194 and accompanying text.

<sup>185</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–74 (1980) (arguing that the Warren Court was motivated by two broad goals: “clearing the channels of political change” and “correcting certain kinds of discrimination against minorities”).

<sup>186</sup> See, e.g., ROUX, *supra* note 143, at 334–35 (applying Ely's theories to South Africa, although finding that because of the dominant-party context, the Court was largely incapable of fulfilling the goals of representation-reinforcement).

<sup>187</sup> See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 361 (2008) (arguing that recent work in political science has tended to underplay anti-democratic concerns with courts and find increasing concern with the behavior of electoral institutions); see also Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 535–36 (2012) (arguing that the rise of “right answer” theories like originalism have weakened Thayerian impulses in the judiciary).

<sup>188</sup> See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336–40 (1998) (challenging the view that judicial decisions are in fact counter-majoritarian and arguing that the “counter-majoritarian” difficulty as an object of study has waxed and waned in importance through United States constitutional history). But see Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 759 (accept-

best way to justify a majoritarian Supreme Court might be that the Court helps to resolve a principle-agent problem, alerting and helping to coordinate resistance if the “agent” (political institutions) carry out tyrannical acts against the principle (the “people”).<sup>189</sup> Efforts by courts to fix fundamental deficiencies in political systems—the kinds of deficiencies that may prevent political institutions from representing even majoritarian groups—could be presented in a similar light. Indeed, courts in places like Hungary and Colombia have at times been defended as representing majoritarian political forces better than political institutions.<sup>190</sup>

With these considerations in mind, one can consider three possible claims justifying the descriptive practices laid out in the first two Parts of this article. First, some strains of practice and scholarship suggest an “institutional replacement” theory, where courts take the failure of existing democratic institutions as a mandate to replace those institutions and carry out some or all of their tasks. There are strains of such an approach, for example, in Indian, Colombian, and Hungarian constitutional practice.<sup>191</sup> Courts, for example, may seek links directly with the populace if they feel that legislatures are not playing this role, or they might seek to make policy directly if they feel that other institutions are not willing or capable of doing so. Judicial action under this conception would be permissible when the court steps in and carries out activity that the political branches themselves either cannot do or cannot do well. The normative justification for a replacement theory could be based on the supposed inapplicability of restraint-based theories.

The replacement approach is unattractive because of its failure to heed institutional and dynamic considerations. First, it invites judges to overstate the differences between newer democracies and more mature democracies. Virtually all democratic systems may have serious problems in their quality of representation, and the differences between systems are better referred to as differences in degree rather than in kind. Further, judiciaries lack the capacity to replace most of the core functions of well-functioning legislative or bureau-

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ing Friedman’s core thesis but arguing that differences in method of appointment between the federal and state judiciary still affect judicial behavior in important ways).

<sup>189</sup> See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 725, 730 (2009) (arguing that judicial review can be justified without necessarily assuming an “antagonistic” relationship between the courts and the people).

<sup>190</sup> See, e.g., Landau, *supra* note 85, at 355–58 (noting how the Colombian Constitutional Court effectively managed a bailout of middle-class homeowners and justified its intervention on the grounds that the Court was closer to the people than political institutions); Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941–49 (2004) (arguing that due to representation problems in Hungary after the democratic transition and pressure from international organizations, courts actually did a better job of representing public will).

<sup>191</sup> See Landau, *supra* note 85, at 345–47 (noting some of the same tendencies on the Colombian Constitutional Court); Robinson, *supra* note 73, at 16–17 (quoting the statements of Chief Justice Balakrishnan, who implied that extreme judicial activism was justified by poor political performance).

cratic officials. The functional lines between courts and other political actors are malleable, but they do exist.<sup>192</sup> In other words, the fact that political institutions are widely perceived as incapable of carrying out certain tasks does not automatically render courts the proper forum for doing so. Institutional failure creates a vacuum, but not necessarily one that courts can legitimately fill.

Finally, the replacement theory is heedless of the dynamic effects of judicial intervention: it would appear to abandon problematic democracies to a permanent state of dysfunction, and it would view that permanent dysfunction as a durable mandate for extraordinary judicial intervention. This view is eerily similar to one long promoted in Latin America, where the supposed absence of democratic values or well-functioning political systems was taken to allow strong presidencies to rule via emergency powers or states of siege.<sup>193</sup> The use of these emergency powers in turn may have helped to perpetuate abnormality by weakening the development of legislative institutions and constitutional values.<sup>194</sup>

A second possible focus for a theory of judicial role would be the process of constitutional transformation itself. It has become commonplace to note that constitutions in new democracies are often “transformative” rather than “preservative.”<sup>195</sup> Transformative constitutionalism seeks to remake a country’s (supposedly deficient) political and social institutions by moving them closer to the sets of principles, values, and practices found in the constitutional text. One might argue that judges in poorly-functioning political systems should focus on realizing the constitutional project. Under such a conception, judicial action would be permissible if it helped to move politics and society closer to

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<sup>192</sup> In the socioeconomic rights context, for example, few scholars deny that there are real differences in judicial versus legislative or executive capacity to make complex policy choices. See, e.g., SUNSTEIN, *supra* note 6, at 223–24 (noting that socioeconomic rights raise special problems of capacity and democratic legitimacy for courts); TUSHNET, *supra* note 6, at 227–34 (same).

<sup>193</sup> See, e.g., Jorge González-Jacome, *Emergency Powers and the Feeling of Backwardness in Latin American State Formation*, 26 AM. U. INT’L L. REV. 1073, 1074 (2011) (noting how nineteenth century political thinkers relied on a perception of “backwardness” to justify extensive exercises of emergency power).

<sup>194</sup> See Schor, *supra* note 64, at 19 (“Excessive presidential power led to greater, not less, unrest as the transition from a government of men to one of laws became impossible.”).

<sup>195</sup> Transformative constitutionalism is itself a vague concept, but has been defined as “a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.” See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998). More broadly, we might define transformative constitutionalism in opposition to preservative constitutionalism: the latter takes a relatively static perspective and seeks to “maintain existing practices and ensure that society does not regress,” while the former seeks substantial transformations in the status quo. See Micah Zeller, *From Preservative to Transformative: Squaring Socioeconomic Rights with Liberty and the American Constitutional Framework*, 88 WASH. U. L. REV. 735, 743 (2011).

the constitutional ideal and impermissible if it either moved politics and society further away from the constitutional ideal or was unrelated to that goal.

A constitutional transformation approach and the democracy-improving approach studied in this article share a dynamic focus. But a constitutional transformation theory is problematic because it again elides institutional considerations: it ignores the question of *which institution* is tasked with the process of constitutional transformation, or rather answers that question by assuming that the process of constitutional transformation should be judge-led. Constitutional mandates are contestable; they are open to interpretation. As Waldron argues, it is often more reasonable to have democratic processes rather than courts make determinations about constitutional meaning.<sup>196</sup> This objection need not fatally undermine all variants of a constitutional transformation theory. It may be that courts are on solid ground in trying to realize important constitutional mandates in cases where the political branches wholly ignore those mandates. But it does suggest that the task of constitutional transformation should be viewed as a second-best to the task of improving political institutions themselves. And because modern constitutions tend to be so thick, a full embrace of a constitutional transformation model would threaten to collapse into the replacement model rejected above.

This leaves a third possibility: courts in new democracies should devote some part of their energy to improving the performance of democratic institutions through time. In other words, courts should play at least a modest role in making abnormal institutions function more normally. This simple formulation, of course, hides a potentially rich agenda and a variety of different tasks. Courts might, for example, aim to make democratic institutions more robust by protecting them from democratic erosion,<sup>197</sup> or they might aim to correct some of the defects inherent in non-institutionalized or dominant-party systems.<sup>198</sup> Courts might also attempt to build up civil society where it has historically been weak, or to construct constitutional cultures in citizens where they do not initially exist.<sup>199</sup> Both approaches were surveyed in some depth above.<sup>200</sup>

A dynamic theory makes sense of the recent trends in constitutional design, judicial behavior, and scholarship surveyed in Parts I and II.<sup>201</sup> Both courts and other institutions in new democracies do make efforts to protect democratic orders, to correct for weaknesses in party systems, and to build civil society and constitutional culture. Further, recent scholarly work has emphasized the dynamic effect that courts might have in new democracies. Recent

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<sup>196</sup> See Waldron, *supra* note 2, at 1366–69, 1406.

<sup>197</sup> See *supra* notes 94–107 and accompanying text.

<sup>198</sup> See *supra* notes 110–150 and accompanying text.

<sup>199</sup> See *supra* notes 152–173 and accompanying text.

<sup>200</sup> See *supra* notes 152–173 and accompanying text.

<sup>201</sup> See *supra* notes 13–173 and accompanying text.

work on Turkey, India, and South Africa, emphasizes the role that courts can play both in protecting democracies from erosion and in improving the performance of dominant-party systems.<sup>202</sup> Another scholar, in a comprehensive book on the enforcement of socioeconomic rights in the developing world, argues that courts should aim to play a “catalytic role,” in particular focusing on empowering civil society groups in contexts where they have historically been weak.<sup>203</sup>

Such a theory of judicial role is related to both the political process and majoritarian strands of constitutional theory. It obviously resembles political process theory in that the justification for review is the improvement of the political system. Highly interventionist decisions in the United States—like structural cases involving school desegregation and prison conditions—were justified in large part in terms of the protection of “discrete and insular” minorities.<sup>204</sup> The difference in the contexts studied here is thus in degree and not in kind. Most importantly, the failures in weak-party and to some extent also dominant-party systems are not just ones which afflict discrete minority groups, but also majorities. This may make the task more feasible—by opening a pathway by which courts can act aggressively and yet popularly—but also more sweeping.

Finally, a dynamic theory is flexible, consistent with a range of specific judicial tasks.<sup>205</sup> Its main value is in suggesting a somewhat different set of questions for evaluating exercises of judicial power. Take, for example, a structural injunction case involving the right to food, like the massive and ongoing case in India.<sup>206</sup> Constitutional theory tends to ask a stock set of questions about these interventions. For example, a key question would generally be whether the intervention is justified by extraordinary circumstances, such as if

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<sup>202</sup> See Issacharoff, *Constitutional Courts*, *supra* note 1, at 993–99 (finding some success for the South African Constitutional Court in ameliorating the negative excesses of a dominant-party system); Issacharoff, *Fragile Democracies*, *supra* note 1, at 1421–50 (surveying and justifying aggressive interventions in the electoral sphere within “fragile democracies” like Turkey and India); see also Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. (forthcoming 2014) (manuscript at 1) [hereinafter Issacharoff, *Consolidated Power*] (exploring the role of constitutional courts in Colombia, South Africa, and Thailand as they seek to mitigate the negative effects of “strong party democracies”).

<sup>203</sup> See Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 INT’L J. CONST. L. 385, 412 (2010) (proposing that courts enforcing socioeconomic rights focus on catalyzing change by, for example, strengthening civil society and its leverage over the state).

<sup>204</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>205</sup> In particular, it does not require that one make global choices between thinner conceptions of democracy, focusing mostly on clean elections, and thicker conceptions focusing also on democratic deliberation. See, e.g., RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 130–57 (2003) (defining and exploring different conceptions of democracy).

<sup>206</sup> See *supra* notes 160–166 and accompanying text.

it benefitted a minority group wholly excluded from the political process.<sup>207</sup> But such a question may make little sense in a poorly-functioning political system, where the popular assumption is that the government serves most groups badly, including middle-class groups that would normally be expected to have a voice. Constitutional theorists would also ask whether the court is extra-limiting by taking on essentially legislative tasks, reaching beyond its capacity and legitimacy.<sup>208</sup> But this assumption of fixed differences between legislative and judicial roles again may make little sense to judges and citizens in many new democracies, because it suggests that courts should defer to institutions that are themselves functioning poorly.

A dynamic perspective would instead focus on a set of questions that may prove more useful, or at least that might supplement those found in conventional theory. Aggressive interventions like those involved in the Indian case might be justifiable if they help to build up the strength of civil society, the density of constitutional culture, and the capacity of the bureaucracy. On the other hand, they would be harder to justify if they tended to slow or reverse improvements in the quality of political institutions through time, perhaps by diverting citizens' attention and resources away from representative institutions and towards courts. The point is not that anything is justifiable from a dynamic perspective, but that the reasons why a given intervention might or might not make sense are somewhat different from those found in conventional constitutional theory.

### *B. The Challenges Posed by a Dynamic Perspective*

The value of a dynamic perspective on judicial role, in other words, is in posing at least two kinds of important questions: (1) questions of plausibility, or whether it is politically feasible for judges to play a role in improving political institutions through time;<sup>209</sup> and (2) questions of democratic impact, or whether a given intervention might have a net-negative impact either by undervaluing the democracy of the present or by warping the path of democratic development for the future.<sup>210</sup> Both points have rich implications for the strategies that judges should utilize under a dynamic approach.

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<sup>207</sup> See *supra* notes 185–186 and accompanying text (discussing political process theory); *infra* notes 219–220 and accompanying text.

<sup>208</sup> See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230 (2006) (arguing that institutionally, legislatures are better at updating constitutional meaning than courts); Waldron, *supra* note 2, at 1406 (stating that legislatures rather than courts are the best place to resolve contested issues about the interpretation of rights).

<sup>209</sup> See *infra* notes 211–223 and accompanying text.

<sup>210</sup> See *infra* notes 224–254 and accompanying text.

## 1. The Challenge of Plausibility

The South African example suggests a first challenge for a dynamic theory of judicial role that focuses on courts improving political institutions: it may be implausible because it requires courts to take actions that go against the core political interests of their own regimes. All normative theories of role are, of course, subject to pragmatic constraints, but a normative theory is of little use if it is nearly impossible for judges to carry out.

Yet in dominant-party systems, particular strategies may indeed be very difficult for courts to pull off precisely because of the constraints imposed by the dominant party. The South African Constitutional Court has been particularly timid when confronted with cases involving the political rights of opposition parties and actors.<sup>211</sup> This has arguably been the Court's biggest disappointment.<sup>212</sup> Although the Court has a relatively high amount of freedom to enforce rights in cases involving the death penalty or socioeconomic rights, it is very constrained when trying to directly open up the political regime because those cases involve core interests of the ANC. A Court overly aggressive on those questions would risk retaliation.<sup>213</sup> More broadly, there is some comparative evidence that a court operating in most political systems with strong parties will often have difficulty working against the core interests of those parties.<sup>214</sup> This is both because the justices themselves are typically products of

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<sup>211</sup> See *supra* notes 142–143 and accompanying text.

<sup>212</sup> See ROUX, *supra* note 143, at 334–35 (noting that the South African jurisprudence turned traditional theory on its head because it showed the Court having difficulty fulfilling a core function of constitutional courts).

<sup>213</sup> See, e.g., Issacharoff, *Consolidated Power*, *supra* note 202, at 42–46 (exploring the risks run by Thailand's constitutional court, which was viewed as taking a side in a political dispute and may thus have inflamed rather than calmed tensions).

<sup>214</sup> Mexico offers a stark example. The Supreme Court of Mexico historically served as a subservient body within what was essentially a one-party dictatorship led by the Institutional Revolution Party ("PRI"), but as the country democratized in the 1990s, the Court was reformed to act as an arbitrator within an emerging three-party system. At least one of the newly empowered opposition parties, the National Action Party ("PAN"), sought institutions that would ensure electoral fairness and guard the separation of powers within a (long-dormant) federal system. See, e.g., JODI S. FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S*, at 89–110 (2008) (noting that judicial reform was supported by the PAN but opposed by the Party of the Democratic Revolution). The Court was designed for those purposes: the reforms to the Court created a new mechanism allowing for minorities in national and state-level legislatures, as well as political parties, to challenge the constitutionality of laws and greatly strengthened an existing mechanism allowing the Court to determine conflicts between different branches or level of governments. The resulting Supreme Court has in many ways been an agent of the interests of these parties. It has, for example, issued important decisions to strengthen federalism and the separation of powers, while doing relatively little to enforce the rights provisions of the Constitution. See Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 *IND. J. GLOBAL L. STUD.* 173, 177–83 (2009). Further, it has, at times, acted against those left out of the party framework. In a 2005 decision, for example, the Court denied an independent candidate even the standing to challenge a law restricting him from running for political office. Ironically, it held that such standing



those parties and because attempts to work against the core interests of strong parties are particularly likely to provoke retaliation against a court. The legal status of third parties within United States constitutional and electoral law might be a case in point.<sup>215</sup> In systems with strong parties, in other words, we would expect the judiciary in some sense to act as an agent for the parties, and that may make them rather unlikely to act in a counter-system manner.

A related but subtler problem may arise in systems where political parties are very weak (see Colombia), or otherwise held in low regard (see India). Here the problem is that courts have incentives to gain political capital by attacking political institutions, rather than by building them up. Where political institutions are weak or perceived as corrupt, justices may be able to gain political support by adopting a discourse and perhaps a jurisprudence that treats them with contempt. The Colombian Court, for example, intervenes aggressively in legislative procedure because it lacks respect for the Congress, and sometimes replaces the political branches in making public policy for the same reason.<sup>216</sup> In one interesting example, the Court stepped in to fix a housing crisis by making a series of policy decisions; the justice who authored the key decisions defended them by quoting a historical populist politician who had stated that “the people are much more intelligent . . . than their leaders.”<sup>217</sup> As explained in more detail below, the long-run effects of these sorts of interventions on the quality of political institutions are unclear.<sup>218</sup> But there is reason to suspect that some of these actions will have negative rather than positive dynamic effects on political institutions.

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was limited to political parties. See Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Amparo en Revisión 743/2005, available at <http://www.poderjudicial.gob.mx/Conferencias%20Transparencia/pdfs%5CMATERIAL%20DE%20CONFERENCIAS%20SOBRE%20TRANSPARENCIA%20IMPARTIDAS%20POR%20LA%20SCJN%5CEJECUTORIAS/743-2005%20AR%20PL%20VP.doc>, archived at <http://perma.cc/PPK6-YJUH>. The laws prohibiting independent candidates were not changed until well after a 2008 decision of the Inter-American Court of Human Rights brought by the loser, which condemned Mexico’s standing laws as a violation of the Inter-American Convention on Human Rights. See *Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations, & Costs, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 251 (Aug. 6, 2008), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_184\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf), archived at <http://perma.cc/U4UX-CPUN> (holding that the existing legal framework violated the right to judicial protection embodied in Article 25 of the American Convention on Human Rights).

<sup>215</sup> Scholars have pointed out that courts in the United States tend to support the entrenched two-party system rather than favoring outsiders or upstarts. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 670–74, 681–90 (1998) (arguing that courts often uphold regulations that are in fact designed to entrench two-party dominance).

<sup>216</sup> See *supra* notes 119–124 and accompanying text (giving examples of relevant caselaw).

<sup>217</sup> See Landau, *supra* note 160, at 219. The case involved a series of Constitutional Court decisions during a housing crisis that threatened several hundred thousand debtors with foreclosure, and in which the Court perceived that the political branches were not taking action. See *id.* at 216–19.

<sup>218</sup> See *infra* notes 235–254 and accompanying text.

The broad point here is that courts are products of their political regimes. This often makes them more likely to act in a pro-system rather than counter-system manner: in the worst case they may actually tend to exacerbate defects in their political systems rather than helping to correct them. This ought to temper our optimism for a dynamic theory of judicial role, but it is not a damning critique of the theory. The same weakness afflicts most constitutional theory. For example, studies of American constitutional history have convincingly shown that the United States Supreme Court normally acts as a majoritarian rather than counter-majoritarian institution, or at least rarely strays from the political mainstream for long.<sup>219</sup> This fact acts as a dose of realism for a number of theories—like political-process theory—that rely on courts taking unpopular decisions.<sup>220</sup> But it does not fatally undermine those theories, because the Supreme Court has often been able to take a number of different decisions while still staying within the political mainstream.

The same point might be made in comparative terms: the shape of a party system places restrictions on a court operating within that system—and thus should make our claims about judicial role more modest in scope—but this does not mean that courts are powerless in correcting the defects found within their political regimes. Even in dominant-party systems, courts can take a range of actions without outrunning their “zone of tolerance.”<sup>221</sup> And in other political systems, particularly non-institutionalized party systems, courts have more freedom of action. These party systems may shape the incentives of courts by giving them a strategy of gaining popularity by undermining the party system, but they do not really limit their freedom of action. Indeed, in inchoate party systems, it may actually be more feasible for courts to play a “political process” role than it is in the United States, precisely because courts can gain majoritarian popularity through efforts to fix their party systems.

The constraints political systems place on judicial power may, however, be useful in thinking through ways in which courts might be most effective in

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<sup>219</sup> See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367–68 (2009) (presenting evidence that the Supreme Court has rarely acted as a long-run counter-majoritarian force); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 166 (2007) (arguing that the U.S. Supreme Court gained political power over time through being useful to dominant political coalitions); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 284 (2010) (noting that “American courts have not, over the long run, acted as strongly counter-majoritarian bodies” and exploring the problems this fact poses for American constitutional theory).

<sup>220</sup> See Dorf, *supra* note 219, at 290 (noting the ways in which Friedman’s majoritarian image of the Supreme Court erodes the evidence for Ely’s process-based theory).

<sup>221</sup> See Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117, 127–29 (2002) (developing a theory of when courts face retaliation and applying that theory to the Russian Constitutional Court).

their task. In particular, they may suggest the superiority of “outsider” strategies over “insider” strategies. The South African case again offers an interesting example. The South African Constitutional Court is highly restricted in the extent to which it can directly increase the power of opposition parties and figures, because cases involving those actors raise core interests of the ANC. Other insider strategies, like propping up the independence of control institutions or using sub-constitutional decisions to aid opposition actors under the radar, may be less constrained.<sup>222</sup> But the South African Court has focused less on outsider strategies, where it may face fewer constraints. The Court is not well-known or particularly popular with the public, and has often not made much effort to engage civil society. This suggests an untapped potential strategy choice, a point I return to below.<sup>223</sup>

In non-institutionalized party systems, outsider strategies may be better than insider strategies for a different reason: the strategy of “building up” a weak party system may be largely impossible for a court to carry out. The various efforts of the Colombian Constitutional Court and other institutions to cleanse the Colombian Congress or to make it a more deliberative body all suggest that there are limits on a court’s ability to organize a disorganized party system. In those circumstances as well, it may be that outsider strategies have more of a chance to work effectively. But the broadest point is that we still know very little about the empirical effects of different strategies through time—this is an area where more empirical research is badly needed.

## 2. The Challenge of Democratic Impact

The dynamic theories that have been developed in comparative constitutional law and practice are necessarily based on a vision that existing political institutions are fundamentally flawed. This vision permits extraordinary interventions in current forms of democracy in the name of constructing a better one. But this conception of the theory raises two significant challenges in its relationship to democracy. First, dynamic theories of judicial role appear to be in constant danger of undervaluing the admittedly flawed democracies of the present.<sup>224</sup> Second, judicial interventions may hinder rather than aid improvement in democratic institutions through time.<sup>225</sup> Both of these possibilities also highlight the sheer vagueness of a dynamic approach in guiding judicial action: it is very difficult for a judge to know whether a given strategy is justified.

First, judicial actors in newer or more fragile democracies and their defenders sometimes act as though their political systems operate on wholly dif-

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<sup>222</sup> See *supra* notes 147–150 and accompanying text.

<sup>223</sup> See *infra* notes 257–287 and accompanying text.

<sup>224</sup> See *infra* notes 226–234 and accompanying text.

<sup>225</sup> See *infra* notes 235–240 and accompanying text.

ferent logics than those in consolidated democracies.<sup>226</sup> But this claim is obviously untrue—all political systems have at least pockets with serious problems of representation, accountability, and capacity. Take the assumption that a congress or parliament be “well-functioning.”<sup>227</sup> Many legislatures around the world might be argued to fail this test, the United States Congress included.<sup>228</sup> The decline in the salience of party systems in most countries has been well-documented.<sup>229</sup> Put in this context, dynamic theories of judicial review may prove far too much—they might justify extraordinary interventions across both developing and developed democracies. Indeed, as a descriptive matter, the disenchantment with electoral politics is part of the explanation for the increasing judicialization of politics around the world.<sup>230</sup>

The possibility of undervaluing the democracy of the present is again an important critique of the theory but not a damning one. There are differences—in degree if not in kind—between different types of democracy. The finding that some systems are particularly prone to democratic failure is real: newer democracies face risks of erosion that are more serious than those found in more-developed democracies.<sup>231</sup> The problems of representativeness and accountability posed by non-institutionalized or dominant-party systems are again real: both systems produce pathologies that are consistent across different countries and predictable in their results.<sup>232</sup> Moreover, pervasive problems of corruption afflict many countries in the developing world, whereas corruption is generally a much less serious problem in developed democracies.<sup>233</sup> In short, there are meaningful differences that justify a different approach in many new democracies.<sup>234</sup>

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<sup>226</sup> See *supra* notes 17–85 and accompanying text (discussing the features and problems associated with dysfunctional democracies).

<sup>227</sup> See *supra* notes 2, 182 and accompanying text (making clear that the assumption is a key one in standard constitutional theory).

<sup>228</sup> See, e.g., Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) (“My central thesis, then, is this: congressional gridlock threatens our constitutional structure—both as originally constructed in 1787 and as it currently stands.”).

<sup>229</sup> See generally Harold D. Clarke & Marianne C. Stewart, *The Decline of Parties in the Minds of Citizens*, 1 ANN. REV. POL. SCI. 357 (1998) (summarizing the decline in rates of party affiliation across the United States, Canada, the U.K., and a range of other advanced democracies).

<sup>230</sup> See, e.g., Elena Martínez Barahona, *Judges as Invited Actors in the Political Arena: The Cases of Costa Rica and Guatemala*, 3 MEX. L. REV. 3, 3, 5–6 (2010) (arguing that empowerment of courts in two Central American countries is largely explained by the distrust of citizens towards their own political systems).

<sup>231</sup> See *supra* notes 20–24 and accompanying text (explaining the rise of hybrid regimes).

<sup>232</sup> See *supra* notes 36–57 and accompanying text.

<sup>233</sup> See, e.g., CORRUPTION PERCEPTIONS INDEX 2013, TRANSPARENCY INT’L (2013), available at [http://files.transparency.org/content/download/700/3007/file/2013\\_CPIBrochure\\_EN.pdf](http://files.transparency.org/content/download/700/3007/file/2013_CPIBrochure_EN.pdf), archived at <http://perma.cc/6MKD-H77E> (showing that perceived levels of corruption are generally relatively low in Western Europe and the rest of the developed world, and higher across the rest of the world).

<sup>234</sup> Courts do have some ability to distinguish well-functioning and poorly-functioning enclaves within their political systems, which could be a useful tool for a court seeking to avoid excessive in-

The more serious challenge to a theory that relies on the dynamic effects of judicial action is the disquieting possibility that judicial interventions aimed at improving democracy through time may actually have negative dynamic effects. In other words, it is possible that institutional designs and judicial decisions designed to improve and normalize democratic performance may have the opposite impact. The problem is perhaps easiest to see with institutions designed to protect against democratic erosion. Some commentators, for example, suggest institutionalizing a role for the military as a hedge against democratic erosion in some political contexts.<sup>235</sup> The theory is that military actors, if inculcated with the proper set of values, can protect democracy with resources that courts do not have.<sup>236</sup> Anti-democratic parties or actors may be able to ignore or pack courts, but they will have more difficulty neutralizing military actors.<sup>237</sup> Others recommend giving courts a predominant role, by allowing them to ban anti-democratic parties or strike down problematic constitutional amendments.<sup>238</sup> Turkish democracy, for example, historically combined elements all pieces of this model. The Turkish military was seen as a guardian of the secular democratic order and stepped in several times to protect against the threat of chaos or the threat posed by Islamist parties.<sup>239</sup> The Turkish Constitutional Court acted aggressively to ban parties and to strike down constitutional amendments that were seen as violating core principles of the constitution.<sup>240</sup>

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interference with democracy. The Colombian Constitutional Court, for example, sometimes seems to build a differential assessment of the quality of legislative deliberation into its jurisprudence. The Court is often faced with questions of whether a given cutback to an existing pension scheme or other social benefit is justifiable. *Compare* Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, available at <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm>, archived at <http://perma.cc/Q7UK-M4D6> (striking down a decision to expand the VAT tax base by taxing goods of primary necessity, because the decision had substantial impacts on the poor, appeared to be “indiscriminate,” and was made without broad legislative deliberation), with Corte Constitucional [C.C.] [Constitutional Court], octubre 10, 2001, Sentencia C-1064/01, available at <http://www.corteconstitucional.gov.co/relatoria/2001/c-1064-01.htm>, archived at <http://perma.cc/6EDY-8LNY> (upholding austerity cuts to the real value of the salaries of higher-income public workers, because the Congress and the Executive had justified the need for cuts in order to preserve social spending for the poor, and the plan had prioritized lower-income workers by keeping their salaries constant).

<sup>235</sup> See *supra* note 107 and accompanying text.

<sup>236</sup> See Varol, *supra* note 107, at 580 (noting that “[t]he judiciary is [unlikely] to fill the enforcement deficit in post-authoritarian societies” because courts are often controlled by authoritarian regimes and, at any rate, usually lack legitimacy).

<sup>237</sup> See *id.* (noting that judicial power is unlikely without the emergence of a “competitive political marketplace”).

<sup>238</sup> See *supra* notes 94–107 and accompanying text.

<sup>239</sup> See Varol, *supra* note 107, at 550–51, 597–605. *But see id.* at 599 (stating that the military once promoted Islam to inhibit the spread of Communism).

<sup>240</sup> See Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488, 507–10, 513 (2006) (considering the Turkish Constitutional Court’s use of its party-banning power); Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Consti-*

The model views these elements as temporary devices to help buy time as the democracy matures. But it is fairly obvious that each of them also poses risks to democratic development, although in different ways and perhaps in different magnitudes. At worst case, an actor designed to protect democracy might play a directly anti-democratic role: the military could overthrow or intervene in a democratic order to establish a military dictatorship or for a number of other bad reasons.<sup>241</sup> More subtly, the existence of all of these crutches might have a negative rather than positive impact on the way that democratic institutions evolve. For example, it may be that if dangerous but seductive political movements are banned from the political sphere rather than being allowed to compete, the remaining parties may not work as hard at developing popular appeal, and thus may be unprepared to compete if they someday have to stand for election against the full spectrum of political competition. Similarly, the doctrine of unconstitutional constitutional amendments may have a negative impact on legislative behavior: legislators, knowing that the court will protect the system from deeply anti-democratic constitutional amendments, will have fewer incentives to develop internal safeguards regarding the use of the amendment process.<sup>242</sup>

The evidence from Turkey, although ambiguous, may support the idea that these kinds of institutions can weaken democratic development through time. Although the Constitutional Court banned several times the large Islamic movement that would become the ruling Justice and Development party, it continued to win votes through successive elections and eventually was allowed to take office.<sup>243</sup> The party platform moderated somewhat with each new incarnation, but the actors and basic goals remained the same.<sup>244</sup> Once it took office, it neutralized the extraordinary powers previously exercised by both the Court and the military. The Constitutional Court was packed by members of the majority party, and the military had its political role largely removed.<sup>245</sup>

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*tutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10 INT'L J. CONST. L. 175, 176, 182–89 (2012) (exploring the Court's use of the unconstitutional constitutional amendment power).

<sup>241</sup> There is a long history of this kind of anti-democratic intervention in many regions of the world, including Latin America. See, e.g., Schor, *supra* note 64, at 21 (pointing out the role that Latin American militaries have played in “maintain[ing] internal order” rather than external peace).

<sup>242</sup> See TUSHNET, *supra* note 59, at 57–58 (referring to this problem as “judicial overhang”).

<sup>243</sup> See Issacharoff, *Fragile Democracies*, *supra* note 1, at 1442–46 (tracing the history of attempts to ban the movement that would become the Justice and Development party).

<sup>244</sup> See *id.* at 1446 (arguing that the political movements moderated through time because “prospect of reintegration into Turkish politics remained present subject to a tempering of the perceived threats to continued democratic order”).

<sup>245</sup> On the Turkish Constitutional Court, see Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1295–96 (2011) (explaining the context in which the Court was packed in 2010, by increasing the number of justices from eleven to seventeen and by giving the ruling party the power to make those appointments). The story with respect to the military is more complex: the ruling Justice and Development party has certainly taken away

The result is that Turkey has become a dominant-party regime, and perhaps is undergoing a process of democratic erosion.<sup>246</sup> The old secular parties, meanwhile, have not fared well within the new system.<sup>247</sup>

Teasing out causation is quite difficult. One might say that the extraordinary institutions—the political role of the military and the exceptional powers of the Constitutional Court—were necessarily temporary, and their defanging was part of the process of normalizing the democracy. As noted above, a theory that allows for a permanent hemming in or replacement of democracy, or that maintains it in a permanent state of abnormality, seems deeply problematic.<sup>248</sup> The only problem may have been the timing: the safeguard institutions were not in place long enough to have the intended effect. On the other hand, there does seem to be some evidence that the secular parties did not develop the political competitiveness or popularity needed to compete on an open playing field. This may have been inevitable, or it may have been a result of the hemming in of democratic institutions.

The Turkish case is an unusual one because the safeguards that were used in that regime placed extraordinary restrictions on democracy. But a similar argument might be made about other judicial efforts to build up democratic institutions. Take, for example, judicial efforts to work around political institutions by building up alternative spaces for democratic development. As already noted, for example, the Indian and Colombian Constitutional Courts have issued structural remedies involving food, healthcare, and other constitutional goods that seemed designed to make themselves the center of policymaking.<sup>249</sup> The dynamic effects of this strategy are unclear. It may be that they start a virtuous circle: a court's efforts to strengthen civil society and increase the salience of constitutional culture may spark new pressures that over time improve the quality of democratic institutions. On the other hand, such powerful judicial action may in fact sap energy from political institutions. As civil society groups and citizens come to view the court and not the political institutions as their best shot at getting responses from government institutions, they may focus on the court rather than on legislatures and executives, thus hindering the

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many of the powers of the military, but scholars have argued that Europeanization and ties with the European Union were a driving force in leading the military to accept the reduction of its powers. See Zeki Sarigil, *Europeanization as Institutional Change: The Case of the Turkish Military*, 12 MEDITERRANEAN POL. 39, 39 (2007) (arguing that the military was “rhetorically entrapped” by its stated commitment to Westernization).

<sup>246</sup> See Ali Çarkoğlu, *Turkey's 2011 General Elections: Towards a Dominant Party System?*, INSIGHT TURKEY, July–Sept. 2011, at 43, 43–44, 59, available at [http://file.insightturkey.com/Files/Pdf/20120903122353\\_insight-turkey\\_volume\\_11\\_number\\_3\\_-ali\\_carkoglu\\_towards-a-dominant.pdf](http://file.insightturkey.com/Files/Pdf/20120903122353_insight-turkey_volume_11_number_3_-ali_carkoglu_towards-a-dominant.pdf), archived at <http://perma.cc/5M6U-8SSW>.

<sup>247</sup> See *id.* at 47 tbl.1.

<sup>248</sup> See *supra* notes 191–194 and accompanying text.

<sup>249</sup> See *supra* notes 152–173 and accompanying text.

development of those institutions. Aggressive judicial assertions of power—even ones designed to improve the quality of democratic politics—may have negative effects on the development of other political institutions.<sup>250</sup>

The possibility again serves as an important critique and corrective on a dynamic theory of judicial review. It counsels for modesty in judicial exercises of power, because we know very little about the dynamic effects of aggressive exercises of judicial review in newer democracies. It is hard to say whether strong courts support or undermine democratic development. Second, it argues for more scholarly work in figuring out which kinds of tools are particularly likely to have negative effects on democratic development.<sup>251</sup> Third, it highlights the uncertainty embedded in a dynamic theory of judicial review, because it suggests that courts and other actors may have a very difficult time figuring out whether a given strategy is justified. Finally, a consideration of the negative effects that exercises of judicial power may have on democratic development might again be helpful in trying to design improved judicial strategies. This may in part be about coming up with less damaging alternatives to existing practices. It may be less harmful to ban particular manifestations of speech within elections than to ban supposedly anti-competitive parties altogether, and it may be better to prohibit parties from competing in elections rather than banning them altogether.<sup>252</sup>

With more complex approaches like structural injunctions, there may be ways to build up civil society without having the court run the risk of replacing the political branches as the center of policymaking. The concept of democratic experimentalism or destabilization rights might be useful here—courts can try to help organize civil society groups, and to give those groups leverage

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<sup>250</sup> See TUSHNET, *supra* note 59, at 57–58.

<sup>251</sup> We may be able to construct such a theory with respect to democracy-preserving institutions. It is clear that granting the military a role in a constitutional democracy is a risky strategy—such a strategy would only be sensible as a “second best” alternative where there were other forces leading to a substantial risk of democratic failure. See, e.g., Virginie Collombier, *The Military and the Constitution: The Cases of Algeria, Pakistan, and Turkey*, ARAB REFORM INITIATIVE 1 (June 2012), [http://www.arab-reform.net/sites/default/files/Const\\_Military\\_and\\_the\\_Constitution\\_V.Collombier\\_May\\_12\\_Final\\_En.pdf](http://www.arab-reform.net/sites/default/files/Const_Military_and_the_Constitution_V.Collombier_May_12_Final_En.pdf), archived at <http://perma.cc/9XMC-DS8F> (noting that military intervention raises a significant risk of failure across all of the countries at issue). Judicial party-banning and the militant democracy model raise an intermediate level of risk: a court probably poses less of a danger to democratic development than the military, but eliminating political forces—especially major forces—from the political playing field may have significant effects on democratic development. Relative to the other two models, the unconstitutional constitutional amendments doctrine seems to pose relatively modest risks to democratic development. An overly-aggressive use of the doctrine may have some effect on the behavior of political institutions—a point I return to below—but these effects are probably smaller than the effects of either institutionalizing a role for the military or prohibiting some political movements from competing.

<sup>252</sup> See Issacharoff, *Fragile Democracies*, *supra* note 1, at 1421–51 (developing a typology of prohibition and limitations on anti-democratic political forces, and noting how alternative devices have been used in places like India and Israel).



over state officials, without themselves becoming the focal point for making policy decisions.<sup>253</sup> This may help to ensure that courts reap the dynamic benefits of judicial activism without paying the high costs of stunting democratic institutions. Courts, in other words, might focus on ensuring that civil society groups have a voice with policymakers (through devices such as public hearings) and monitoring the development of negotiated solutions, rather than with direct exercises of setting policy.<sup>254</sup> The point of this Section, at any rate, is not to design particular remedial strategies but to suggest that the problem of judicial activism warping democratic development is one that should shape strategy choices by judges. The next Part takes these considerations further, by showing how a dynamic perspective is helpful in providing perspective on some of the most difficult contemporary problems in the field of comparative constitutional law.

#### IV. THE THEORY APPLIED: TWO PROBLEMS IN COMPARATIVE CONSTITUTIONAL LAW

One test of a theoretical approach is whether it is useful “in action” to shed light on live debates: this section demonstrates that a dynamic theory can provide that perspective. In particular, I apply the theory to two of the most important and unsettled questions in the field of comparative constitutional law: the debate about the forms of review or the intensity with which courts seek to review political action,<sup>255</sup> and the debate about the appropriateness of a substantive doctrine of unconstitutional constitutional amendments.<sup>256</sup> In both cases, I show that the approach is useful in helping to frame the questions that judges should be asking.

##### *A. The Debate Between Weak-Form and Strong-Form Review*

Some of the most important recent work in the field has focused on the proper means for judges to exercise judicial review, particularly for newer rights like socioeconomic rights. The centerpiece of this literature is the fa-

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<sup>253</sup> For the foundational work on democratic experimentalism and judicial review, see generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004). Sabel and Simon argue that modern public law litigation works by providing a set of “destabilization rights,” which they define as “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.” See *id.* at 1020. They contrast their model from traditional command-and-control litigation, where courts come up with detailed decrees envisioning all aspects of the policy *ex ante* and closely monitor the defendant’s compliance with the prescriptions found in that decree. See *id.* at 1021.

<sup>254</sup> For more detail on this model of judicial involvement, see *infra* notes 271–287 and accompanying text.

<sup>255</sup> See *infra* notes 257–287 and accompanying text.

<sup>256</sup> See *infra* notes 288–325 and accompanying text.

mous 2001 case *Government of the Republic of South Africa v. Grootboom*, in which the South African Constitutional Court ruled that Parliament had a duty to provide a solution to the lack of available housing for the poor.<sup>257</sup> A large group of commentators has lauded *Grootboom* as inventing a new form of review and as representing a “canonical” case within the field.<sup>258</sup>

In *Grootboom*, the South African Constitutional Court considered a challenge to South African housing policy by an impoverished woman who had been evicted from her existing housing and who had no other access to housing.<sup>259</sup> She claimed that South Africa’s housing policies, and particularly its failure to provide short-term solutions for people like her who were in desperate need, violated the constitutional right to housing.<sup>260</sup> The South African Constitutional Court agreed with the plaintiff, but refused to issue either an individualized remedy or a structural remedy covering all plaintiffs in her situation. Instead, the Court merely issued a declaration that the state was not fulfilling the constitutional rights at issue because it had no plan for people with the gravest short-term needs, and asked the Parliament and other authorities to fix that deficiency.<sup>261</sup>

This approach to rights-enforcement has been dubbed “weak-form” enforcement. Weak-form enforcement is a model of review where the court points out violations of rights to the political branches and to the citizenry, but then steps back rather than seeking to make policy on the right at issue.<sup>262</sup> Legislative actors can then “address—or deliberately refuse to address—the difficulties the courts have identified.”<sup>263</sup> This is contrasted to standard “strong-form” review, where the Court itself makes the relevant policy determination.

Scholars have praised the *Grootboom* decision, and more broadly weak-form review, as properly reconciling the enforcement of rights—particularly

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<sup>257</sup> See *Gov’t of the Republic of S. Afr. v. Grootboom*, 2001 (1) SA 46 (CC) para. 99, available at <http://www.saflii.org/za/cases/ZACC/2000/19.pdf>, archived at <http://perma.cc/DE4K-HVP4>.

<sup>258</sup> See, e.g., ROUX, *supra* note 143 at 280 (“*Grootboom* is to South African constitutional lawyers what *Brown v. Board of Education* is to their American counterparts.”); SUNSTEIN, *supra* note 6, at 229 (noting the decision’s “distinctive and novel” approach); TUSHNET, *supra* note 6, at 242 (calling the case “celebrated”); Heinz Klug, *Grootboom* at Home and Abroad: Adventures in the Construction of a Global Constitutional Canon 1 (Feb. 24, 2012) (unpublished manuscript), available at [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1149&context=schmooze\\_papers](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1149&context=schmooze_papers), archived at <http://perma.cc/J37G-5MBR> (describing the decision as “canonical”).

<sup>259</sup> See *Grootboom*, (1) SA 46 at paras. 3–4.

<sup>260</sup> See *id.* at para. 13.

<sup>261</sup> See *id.* at para. 99 (issuing a declaratory order announcing, *inter alia*, that “Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing”).

<sup>262</sup> See, e.g., Mark Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 2 (2006) (defining weak-form review as a style of review where “judges’ rulings on constitutional questions are expressly open to legislative revision in the short run”).

<sup>263</sup> Tushnet, *supra* note 3, at 2249.

socioeconomic rights—with democracy.<sup>264</sup> They point out that socioeconomic rights like the right to food, housing, and healthcare raise special concerns of democratic legitimacy and capacity because they may require that judges rework state priorities and make decisions involving large amounts of budgetary resources.<sup>265</sup> Although many non-socioeconomic rights cost money (take the right to a fair trial), there are real differences in degree, if not in kind, between so-called first generation rights and socioeconomic rights.<sup>266</sup>

Supporters of weak-form review thus view it as a way to reconcile especially troublesome kinds of rights with democracy. Courts can act to vindicate the right while being especially careful to avoid invading the proper space of political actors. In other words, these scholars see weak-form review as the solution to judicial overreaching within a standard, static conception of democratic theory. Given this theoretical construct, weak-form review is arguably “the only decent institutional design for the enforcement of social and economic rights,” and perhaps for the enforcement of a much broader set of rights as well.<sup>267</sup>

Although the *Grootboom* decision has largely been celebrated by foreign constitutional theorists who view it as the solution to their own difficult problems of constitutional theory, it has received a very different reception in South Africa, where it is commonly (although not universally) viewed as a disappointment.<sup>268</sup> The case against *Grootboom* is that the Court’s remedy—an exhortation to the political branches to take unspecified forms of action—was too weak to achieve anything.<sup>269</sup> Similarly, the “model” of review invented by

<sup>264</sup> See SUNSTEIN, *supra* note 6, at 235 (praising the decision for “promoting a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life”); TUSHNET, *supra* note 6, at 244 (noting that the order in *Grootboom* had “some judicially enforceable content” but “was quite limited in its effects”).

<sup>265</sup> See TUSHNET, *supra* note 6, at 231–33. Tushnet quotes Frank Cross’s well-known argument against judicial enforcement of social rights in the United States because such “enforcement [either] raises the spectre of ‘the courts running everything . . .’ or the much more likely view that courts will do nothing with those rights because they view them as too politically-costly to enforce. See *id.* at 231; see also Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 887 (2001) (“[B]oth the critics and the proponents often misconceive the likely consequences of positive rights recognition, namely that positive rights would not be aggressively enforced.”).

<sup>266</sup> See TUSHNET, *supra* note 6, at 234 (noting that first-generation rights like the right to free speech imply costs but arguing that “the size of budgetary consequences matters”).

<sup>267</sup> See Tushnet, *supra* note 3, at 2259.

<sup>268</sup> See, e.g., David Bilchitz, *Giving Socioeconomic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 484 (2002) (criticizing *Grootboom* as having an “undesirable effect” on enforcement of the social right at issue); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form v. Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 392 (2007) (noting that South African “[c]onstitutional scholars now agree generally that the Court’s intervention was—to an important degree—too limited or ‘weak’”).

<sup>269</sup> See, e.g., Dennis Davis, *Socio-economic Rights in South Africa: The Record of the Constitutional Court After Ten Years*, ESR REV., Dec. 2004, at 3, 5 (arguing that, in response to *Grootboom*,

*Grootboom* has not spread to the rest of the developing world. Others courts active in enforcing socioeconomic rights in Latin America and Asia have relied on a different set of approaches, including giving individual plaintiffs specific individual remedies and using structural injunctions.<sup>270</sup>

Within South Africa itself, however, *Grootboom* has important progeny: a series of follow-up cases also on the right to housing, and in which the South African Constitutional Court has tried to make weak-form review more effective. Most of these cases involved poor citizens at risk of being evicted from their homes, and without any other place to live.<sup>271</sup> The Court began issuing what it called “engagement” remedies, where it required officials to negotiate with private actors or with their civil society representatives before carrying out the eviction.<sup>272</sup> This allowed the Court to resolve the case without getting into a deep discussion of the underlying constitutional law issues, and without directly making policy. Sometimes, these engagements resulted in successful outcomes and serious discussions; often, they did not.<sup>273</sup>

In recent cases, the Court has tried to put more teeth into the engagement remedy by requiring that the state follow particular procedures in the course of the engagement. For example, the Court has required that the state consider certain issues—say the presence of adequate alternative housing—before carrying out an eviction.<sup>274</sup> Further, in recent decisions, the Court has shown a tendency to avoid constitutional issues if it can: it has treated arguably constitutional issues as statutory ones. In particular, it has shoe-horned many of the recent housing cases into the Prevention of Illegal Eviction from and Unlawful

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“there has been little visible change in housing policy to cater for people who find themselves in desperate and crises situations”).

<sup>270</sup> See Landau, *supra* note 160, at 199 (finding that the South African approach has “not been used anywhere else”).

<sup>271</sup> For a comprehensive overview of post-*Grootboom* housing jurisprudence up to the present, see generally Brian Ray, *Evictions, Avoidance, and the Aspirational Impulse*, CONST. CT. REV. (forthcoming 2014) (S. Afr.).

<sup>272</sup> See, e.g., *Occupiers of 51 Olivia Road v. City of Johannesburg*, 2008 (3) SA 208 (CC) paras. 9–11, available at <http://www.saflii.org/za/cases/ZACC/2008/1.pdf>, archived at <http://perma.cc/DF6A-ARLX> (describing the process of engagement ordered by the Court in a prior decision).

<sup>273</sup> See Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 837–42 (describing the failure of an engagement order in a case, *Mamba v. Minister of Soc. Dev.*, 2008 Case No. CCT 65/08 (CC) (S. Afr.), involving refugee camps that were scheduled to be shut down).

<sup>274</sup> See *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread*, 2012 (2) SA 337 (CC) at para. 21, available at <http://www.saflii.org/za/cases/ZACC/2011/35.pdf>, archived at <http://perma.cc/UVG-6LNK> (issuing an order requiring a detailed report from the local government covering, *inter alia*, (1) “the particulars of the housing situation of the applicants,” (2) “the steps it has taken . . . [to] provide alternative land or housing,” (3) when that alternative land or housing will be provided, (4) “the effects of an eviction” if undertaken without alternative accommodation, and (5) whether and how the city can take steps to “alleviate” the harms to the property owner if there was a delay in the eviction).

Occupation of Land Act, even if there was some question as to whether that framework should have applied.<sup>275</sup>

One way to look at the recent decisions is that the Court is slowly moving along a spectrum of weak-form and strong-form enforcement, closer to the strong-form pole.<sup>276</sup> In other words, that it is trying to give its initial efforts at weak-form review in cases like *Grootboom* more teeth and a higher probability of actually producing results within individual cases. In a careful way, the Court is seeking to trade off some degree of deference to the political branches for increasing effectiveness.

A dynamic theory of judicial review suggests a related but different point: the debate about weak-form review misses key dimensions of judicial role in new democracies. From a dynamic perspective, the South African Constitutional Court's series of efforts to intervene in the housing sector should be judged at least partially by whether they helped to "catalyze" civil society movements and to increase the leverage of those movements over state officials, as well as by whether they extended the importance of constitutional culture within the country.<sup>277</sup> The line of cases could be viewed as a type of "outsider" strategy, noted above, where courts seek to work around political institutions and to instead build up alternative spaces for democratization.<sup>278</sup> This should be an attractive strategy in South Africa, because the main alternative—a strategy that seeks to temper the excesses of a dominant-party system directly—is largely closed off.<sup>279</sup> The Court has had more space in socioeconomic rights cases partly because it faces sympathetic factions within the dominant-party itself.<sup>280</sup>

A dynamic perspective thus suggests a different set of tools for critiquing the work of the South African Constitutional Court. On the positive side, its engagement orders are directly aimed at giving civil society groups a voice.

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<sup>275</sup> See, e.g., *Maphango v. Aengus Lifestyle Properties*, 2012 (3) SA 531 (CC) at para. 48 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2012/2.pdf>, archived at <http://perma.cc/7UQ6-RD68> (deciding to use the statute even though neither party had relied heavily upon it in their submissions, because of "[r]ule of law considerations"); see also Frank I. Michelman, *Expropriation, Eviction, and the Gravity of the Common Law*, 24 STELLENBOSCH L. REV. 245, 259 (2013) (S. Afr.) (explaining cases like *Maphango* as a device of "inter-branch comity").

<sup>276</sup> See Ray, *supra* note 271, at 7–9 (arguing that the Court can use various devices to ratchet up the impact of its jurisprudence on housing issues).

<sup>277</sup> See KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 172–73 (2012) (arguing that courts enforcing socioeconomic rights should aim to "catalyze" change by other institutional actors).

<sup>278</sup> See *supra* notes 151–154 and accompanying text.

<sup>279</sup> See *supra* notes 110–150 and accompanying text (noting the struggles of the South African Constitutional Court in seeking to ameliorate the effects of the country's dominant-party system).

<sup>280</sup> See *supra* notes 144–146 (describing an instance when the Court took advantage of such a split within the dominant ANC party); see also ROUX, *supra* note 143, at 292–303 (describing the role of the South African Constitutional Court in an important healthcare case involving the ANC and the Treatment Action Campaign).

They force local officials to speak with groups that would otherwise be marginalized and that would otherwise have little ability to combat their evictions. The Court's use of enhanced procedural techniques is particularly interesting in this regard: by laying out the kinds of topics that need to be addressed before any eviction may occur, and by regulating the sorts of processes through which the discussion must proceed, the Court has done some work in making sure that political actors do not simply ignore the existence of civil society.<sup>281</sup>

But key features of the remedial design would also seem to limit the extent to which these decisions serve to increase the organization and power of civil society groups, or to extend the reach of constitutional culture. The Constitutional Court has tended to treat the engagement actions as a set of independent, atomized discussions between an individual set of local officials and an individual set of evictees. There is no institutional structure linking together the separate cases. And the Court's focus has been on resolving individual cases rather than on articulating a broader set of norms or values.<sup>282</sup> The Court's engagement orders generally focus on the individual cases, rather than on making broader policy changes to the housing sphere.<sup>283</sup> They seem calculated to have little symbolic value, because they generally avoid constitutional issues if possible and focus instead on the details of statutes.<sup>284</sup> This may rob the Court's decisions of the symbolic force needed to help create or hold together a movement.<sup>285</sup> And it may prevent the Court's decisions from having the kind of broader impact needed to construct and maintain a constitutional culture built around socioeconomic rights.

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<sup>281</sup> See *supra* note 274 and accompanying text (describing the detailed engagement order at issue in the *Golden Thread* case).

<sup>282</sup> See Ray, *supra* note 271, at 13 (finding that the Court often "provid[es] concrete relief to the individual plaintiffs without tying that relief to any broader constitutional requirement").

<sup>283</sup> See, e.g., *Golden Thread*, (2) SA 337 at para. 21 (issuing a detailed set of requirements for reporting within the confines of the individual plaintiffs at issue, but requiring no information beyond the confines of the specific case).

<sup>284</sup> See *supra* note 275 and accompanying text (elaborating on the Court's propensity for avoiding constitutional issues in favor of statutory issues).

<sup>285</sup> The Court has sometimes showed more of a propensity to build up the power of civil society. In probably the Court's most effective socioeconomic intervention, for example, the *Treatment Action Campaign* case, 2002 (5) SA 721 (CC), the Court relied on a relatively developed set of civil society actors to bring it a case challenging the government's refusal to expand a network of highly effective drugs preventing transmission of HIV from mother to child, despite an absence of cost considerations (the drugs were being provided for free). See, e.g., William Forbath et al., *Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign*, in STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 51, 51–52 (Lucie E. White & Jeremy Perelman eds., 2011). Even though the court did not issue a structural remedy or otherwise maintain supervision over the case, it did catalyze the Treatment Action Campaign by giving it a clear victory over the state. See YOUNG, *supra* note 277, at 262 (describing the Treatment Action Campaign's more recent attempts to pressure the state). In contrast to the eviction cases considered here, the *Treatment Action Campaign* case was a clear and well-publicized victory.

At least some of these weaknesses could be remedied without the Court's approach necessarily collapsing into strong-form review, where the Court directly makes the policy decision at issue. The Court could work at institutionalizing a long-term role for civil society linked across different cases, perhaps by creating a Commission composed of a mix of groups of displaced persons themselves with both national and international NGOs.<sup>286</sup> The Court could also do more to publicize the cases over which it has taken jurisdiction, perhaps by holding televised or media-saturated hearings at which it dealt with the issues raised in the eviction petitions.<sup>287</sup> The Court could do more to develop the substantive constitutional principles enveloped in the right to housing that it applies through its case law. Finally, it could broaden the scope of engagement by giving civil society groups a voice not only in the individual eviction at issue, but also in the broader construction of housing policy. None of these shifts would force the judiciary to give itself the "last word" in setting housing policy. But they probably would help to ensure a more robust civil society in the housing sphere.

The weak-form review debate has been constructed to answer a particular problem stemming from mature democracies: how can rights enforcement best be structured so as to avoid invading the space of democratic actors? This is a highly relevant question within mature democracies; it may be a less relevant question in newer democracies with serious defects in their democratic institutions. A dynamic perspective suggests instead a richer debate on remedies, which would mine a set of tools existing somewhere on a spectrum between weak-form and strong-form review. And it would work towards figuring out which of those tools did the most effective job, in different kinds of contexts, at building up the strength of civil society around constitutional issues, in giving civil society a voice within the state, and in constructing a more salient constitutional culture.

### *B. The Unconstitutional Constitutional Amendment Doctrine*

The doctrine of unconstitutional constitutional amendments stands as one of the oddest and most difficult doctrines to justify in comparative constitutional law. From the standpoint of most veins of conventional constitutional theory, the doctrine is a puzzle. Striking down a proposed constitutional amendment on the ground that that amendment conflicts with unwritten constitutional principles is the "most extreme of counter-majoritarian judicial acts."<sup>288</sup> Ordinary judicial review strikes down statutes but leaves political ac-

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<sup>286</sup> See *supra* notes 152–173 and accompanying text (describing how such an approach has been used in both Colombia and India).

<sup>287</sup> See Rodríguez-Garavito, *supra* note 153, at 1669 (describing such hearings held in Colombia).

<sup>288</sup> Jacobsohn, *supra* note 5, at 1799.

tors with the safety valve of passing amendments in order to override that judicial decision.<sup>289</sup> The unconstitutional constitutional amendments doctrine takes away the safety valve and removes any possibility of political and popular override of the judiciary, at least short of wholesale constitutional replacement.<sup>290</sup> It is no wonder that many constitutional theorists have found the doctrine difficult to justify.<sup>291</sup>

Yet in comparative terms, the doctrine is one of the greatest success stories in the field, spreading across the world to include systems in Asia, Latin America, Africa, and Eastern Europe.<sup>292</sup> And in some countries, judges now deploy the doctrine relatively routinely: citing a few examples from India and Colombia might be helpful in showing the doctrine's modern scope. In Colombia, the best-known uses are the cases involving President Alvaro Uribe's second and third terms, where the Court allowed a constitutional amendment permitting one reelection but blocked a constitutional amendment permitting two, in a decision heralded as potentially preventing significant democratic erosion.<sup>293</sup> The Court's reasoning noted that the proposed third term, under the domestic constitutional design, would give Uribe unprecedented power to appoint and influence officials staffing independent institutions that were supposed to check him.<sup>294</sup> Further, it pointed out after a brief comparative survey

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<sup>289</sup> See, e.g., Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in COMPARATIVE CONSTITUTIONAL LAW 96, 98 (Tom Ginsburg & Rosalind Dixon eds., 2011) (noting that one function of constitutional amendment is in "trumping existing judicial interpretations").

<sup>290</sup> The question of whether constitutional replacement is a possibility depends on one's view of whether and how the existing constitution constrains the possibility of writing a new constitution. See, e.g., Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOOD HALL L.J. 199, 203–19 (2010) (outlining and describing a broad theory of constituent power that gives the people powers of constitutional replacement).

<sup>291</sup> See, e.g., Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURISPRUDENCE 5, 22–23 (2009) (the doctrine is "curious"); Cassels, *supra* note 167, at 501 n.34 ("highly problematic and controversial"); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 58 n.268 (2003) ("extreme example of judicial activism"). Jacobsohn himself notes that the doctrine may justify use only in cases so extreme as to make one wonder whether applying the doctrine would have any point. See Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution?: A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 487 (2006) ("[I]f ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing.").

<sup>292</sup> See Roznai, *supra* note 104, 677–713 (2013) (tracing the migration of the doctrine across a large number of countries).

<sup>293</sup> See Issacharoff, *Consolidated Power*, *supra* note 202 (crediting the Constitutional Court with helping to defend the democratic order).

<sup>294</sup> See Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, § III.2.8.1, available at <http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm>, archived at <http://perma.cc/ZU87-E4PC>. The Court noted that, for example, many institutions had staggered terms or longer terms than the President, and others were insulated by having some other institution make the selection. But after twelve years in power, the President would, realistically, gain power over virtually all of these institutions. See *id.*



that in pure presidential systems, third-term presidencies were rarely allowed.<sup>295</sup>

In a series of additional cases, the Colombian Constitutional Court has either threatened to use or actually used the doctrine in less dramatic circumstances. For example, in 1994, in the landmark case *C-221/94*, the Colombia Constitutional Court legalized simple drug possession, citing principles of personal autonomy.<sup>296</sup> When political actors passed a constitutional amendment recriminalizing drug possession but providing for treatment rather than criminal penalties, the amendment was challenged in front of the Court. The Court dismissed the petition on technical grounds, but suggested that any attempt to impose criminal penalties would have been an unconstitutional constitutional amendment, because it would have replaced core constitutional principles of individual autonomy.<sup>297</sup> In a second case, in 2009, in *C-588/09*, the Colombian Constitutional Court actually struck down an attempt to evade prior Constitutional Court decisions forcing the entire bureaucracy—including incumbents—to stand for meritocratic civil service exams rather than automatically being confirmed in their posts.<sup>298</sup> After the Court invalidated laws attempting to exempt some incumbent bureaucrats from civil service exams mandated by the Constitution of 1991, Congress responded by passing a constitutional amendment to the same effect. The Court invalidated the constitutional amendment, holding that it was unconstitutional because it substituted the constitutional principle of meritocracy.<sup>299</sup>

In 2012, in *C-288/12*, the Colombian Constitutional Court upheld a constitutional amendment that created a new mechanism for executive officials to ask courts to review and reconsider their previously-made decisions if those decisions have significant fiscal consequences.<sup>300</sup> The amendment purported to

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<sup>295</sup> See *id.* § V.6.3.5.1.1–1.3.

<sup>296</sup> See Corte Constitucional [C.C.] [Constitutional Court], mayo 5, 1994, Sentencia C-221/94, § 6.2.4, available at <http://www.corteconstitucional.gov.co/relatoria/1994/c-221-94.htm>, archived at <http://perma.cc/LS24-2VLF>.

<sup>297</sup> See Corte Constitucional [C.C.] [Constitutional Court], julio 22, 2011, Sentencia C-574/11, available at <http://www.corteconstitucional.gov.co/relatoria/2011/c-574-11.htm>, archived at <http://perma.cc/7BYL-TGY6>. The technical reasons for dismissing the petition were that the actor had only challenged the piece of the amendment criminalizing drug possession, and had not also included in the demand the part of the amendment providing for “treatment” rather than punishment. See *id.* § VI.6.1–.15.

<sup>298</sup> See Corte Constitucional [C.C.] [Constitutional Court], agosto 27, 2009, Sentencia C-588/09, §§ II, IV.6, VII, available at <http://www.corteconstitucional.gov.co/relatoria/2009/C-588-09.htm>, archived at <http://perma.cc/A4A6-YN8D>.

<sup>299</sup> See *id.* §§ IV.6, VII.

<sup>300</sup> See Corte Constitucional [C.C.] [Constitutional Court], abril 18, 2012, Sentencia C-288/12, §§ II, VII, available at <http://www.corteconstitucional.gov.co/relatoria/2012/C-288-12.htm>, archived at <http://perma.cc/Z9CT-BZ2Z> (giving the text of the amendment at issue and upholding the validity of the law).

create a new constitutional principle of “fiscal sustainability.”<sup>301</sup> The amendment was passed in reaction to the Constitutional Court’s extensive jurisprudence on socioeconomic rights, which many government officials thought too costly and too interventionist.<sup>302</sup> Under the Court’s long-standing interpretation of article 1 of the Constitution, which defines Colombia as a “social state of right,” socioeconomic rights are broadly judicially enforceable and the state must prioritize social spending.<sup>303</sup>

The amendment was challenged as a possible substitution of the constitution, and the Court upheld the amendment only after limiting its effect in important ways. The Court held that “fiscal sustainability” should be understood as a mere instrument in service of the realization of fundamental rights and principles, rather than as a fundamental principle in its own right.<sup>304</sup> Further, the Court held that the new mechanism for reconsideration was constitutionally acceptable only because it left the judge who made the decision with full authority over whether to reverse the prior decision or even to hear arguments on a challenge.<sup>305</sup> In effect, the Court applied a supra-constitutional canon of avoidance, upholding the constitutional amendment only by defanging it.

The Indian jurisprudence shows a similar tendency towards cases where the unconstitutional constitutional amendment doctrine is not necessarily playing a role of democratic defense. The origins of the doctrine in fact focus on the protection of private property, rather than on democratic protection.<sup>306</sup> And during Indira Gandhi’s emergency, which posed a significant threat of democratic erosion, the Court undertook only very cautious and limited efforts at stopping Gandhi from insulating her actions entirely from judicial review.<sup>307</sup>

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<sup>301</sup> *See id.*

<sup>302</sup> *See id.* § VI.32.

<sup>303</sup> This is a simplification of a complex concept. *See, e.g.,* David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 267 (Aoife Nolan ed., forthcoming 2014).

<sup>304</sup> *See Sentencia C-288/2012*, § VI.64 (stating that the principle “is not a constitutional end in its own right, but just a means for the achievement of the social and democratic state of right”) (author’s translation).

<sup>305</sup> *See id.* § VI.74.3.

<sup>306</sup> *See, e.g.,* *Golaknath v. Punjab*, (1967) 1967 A.I.R. 762 (India), available at <http://indiankanoon.org/doc/120358/>, archived at <http://perma.cc/B3NK-S2A4> (holding in a case involving restrictions on the ownership of private property that the amendment power could not take away or abridge a fundamental right).

<sup>307</sup> *See, e.g.,* *Kesavananda Bharati v. Kerala*, A.I.R. 1973 S.C. 1461 (India), available at <http://indiankanoon.org/doc/257876/>, archived at <http://perma.cc/W4Y2-MKCJ> (in a case predating the emergency period of Gandhi’s rule, striking down a constitutional amendment that exempted certain kinds of legislation from judicial review); *Indira Nehru Gandhi v. Shri Raj Narain*, A.I.R. 1975 S.C. 2299 (India), available at <http://www.indiankanoon.org/doc/936707/>, archived at <http://perma.cc/CWS7-TACP> (striking down an amendment passed by Gandhi and insulating electoral disputes from the ordinary judiciary and the Supreme Court); *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789 (India), available at <http://indiankanoon.org/doc/1939993/>, archived at

These decisions played a modest but perhaps meaningful role at preventing an erosion of democracy. More recent cases, issued after the political system fragmented, have also focused on the insulation of activity from judicial review, but within quite different contexts. For example, in 1997, in *L. Chandra Kumar v. Union of India*, the Indian Supreme Court held that constitutional amendments shunting cases concerned with the civil service away from the ordinary judiciary and into newly created administrative tribunals were violations of the basic structure doctrine and thus unconstitutional constitutional amendments.<sup>308</sup> Indeed, one commentator has argued that the main thrust of the doctrine, in terms of its actual use, has been to allow the judiciary to act as a “closed shop” by cutting off other avenues of redress like special tribunals and arbitration panels.<sup>309</sup>

In examining these cases, the core question is the following: What explains the divergence between the expectations of standard constitutional theory and the reality of practice, under which the doctrine is regularly used? A dynamic perspective of judicial role offers the groundwork for a reasonable defense of the doctrine.<sup>310</sup> Descriptively, it explains why the use has become so routinized across certain countries. Usage of the doctrine is based both in a distrust of existing democratic institutions, which are seen as capable of producing flawed constitutional amendments, and concern about the effects that certain amendments might have on the democratic order.<sup>311</sup> Normatively, the fact that certain democracies are relatively fragile gives some justification for using the doctrine in order to defend against democratic erosion. At least some uses of the doctrine—the Uribe reelection decisions and the Indian cases dur-

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4EX2 (in a post-emergency case reviewing emergency-era amendments, striking down constitutional changes that insulated legislation intended to realize certain kinds of goals from judicial review).

<sup>308</sup> *L. Chandra Kumar v. Union of India*, A.I.R. 1997 S.C. 1125, at para. 100, available at <http://indiankanoon.org/doc/1152518/>, archived at <http://perma.cc/M7LU-CS4Y>.

<sup>309</sup> See Rohit De, *Jurist's Prudence: The Indian Supreme Court's Response to Institutional Challenges*, I-CONNECT (Dec. 12, 2012), <http://www.iconnectblog.com/2012/12/jurists-prudence-the-indian-supreme-courts-response-to-institutional-challenges/>, archived at <http://perma.cc/Y6GR-8E2L>.

<sup>310</sup> In contrast, existing theories do a fairly poor job of explaining and justifying the doctrine. The leading contender is the theory of “original constituent power,” under which some changes to the existing legal order are so fundamental that they are reserved to the “people” and can only be made through wholesale replacement of the existing constitution. Colón-Ríos, *supra* note 290, at 204–09 (providing an overview of the theory of constituent power). In contrast, the “constituted powers”—the institutions of state—enjoy only a limited power of constitutional change, without any ability to alter those fundamental principles. This principle has been adopted by many of the courts using the doctrine. See *id.* at 219–28. But unless the constitutional text clearly limits the power of constitutional amendment (which is fairly rare), there is no reason to assume any limitation on the amendment power of the constituted powers, and perhaps even less reason to think that courts rather than the political branches should be the ones charged with discovering those limits. See Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT’L J. CONST. L. 339, 347 (2013).

<sup>311</sup> See, e.g., Robinson, *supra* note 73, 33 (noting that the Indian basic structure doctrine gains strength out of a sense of democratic distrust).

ing the emergency—may be justifiable in light of the fragility of their democratic orders.<sup>312</sup> Where judges have good reason to believe that a set of constitutional changes raises a significant risk of democratic erosion, they may be on solid ground in striking down constitutional amendments.<sup>313</sup>

Use beyond clear cases of democratic preservation raises more difficult issues. There are dual risks to broader use: (1) excessive distrust of current democracy and (2) possible warping of the pathway of democracy.<sup>314</sup> On the first point, it is surely not an accident that the doctrine has made the most headway within systems where there is a pervasive public distrust of political institutions, and where judges openly share that distrust.<sup>315</sup> But the fact that political institutions sometimes function badly does not imply that they always function badly. This suggests that use of the doctrine should be restrained. Invalidation of a constitutional amendment is an act that expresses much more disrespect of political institutions than ordinary exercises of judicial review.

Many—perhaps most—uses of the doctrine fail under this criterion. Many uses of the doctrine appear to be based on turf-protection: courts use their ultimate power over constitutional amendment to protect the doctrines or interests that are dear to them. There is also some evidence that the doctrine can become an ordinary tool of democracy-improvement: courts strike down amendments eluding meritocracy, or transferring cases outside of the ordinary judiciary, not because they reasonably fear a significant retrogression in the democratic order but because they perpetuate problematic aspects of the system, like bureaucratic incapacity.<sup>316</sup> These uses of the doctrine are difficult to justify: the ends pursued by courts may be important, but there are less problematic ways to pursue them. Exercises of ordinary judicial review should suffice.

The second risk—that use might warp democratic development—may be less serious. The doctrine of unconstitutional constitutional amendments is

<sup>312</sup> See *supra* notes 131–133, 194–196 and accompanying text.

<sup>313</sup> There is a separate question lurking here—how do judges know that a given constitutional change in fact will work substantial erosion in the democratic order? One possibility is to use comparative or transnational guidance as a check on judicial over-activism, and to strike down amendments primarily when the change at issue would create an institutional design not generally seen elsewhere. See Dixon & Landau, *supra* note 106. In the Uribe cases, for example, the Court placed great weight on the fact that two-term presidencies were common in pure presidential systems, but the allowance of additional terms beyond two terms is quite rare comparatively. See Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, §§ V.6.3.5.1.1–1.3, available at <http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm>, archived at <http://perma.cc/AC8A-JK3E>.

<sup>314</sup> See *supra* notes 216–219, 250–254 and accompanying text (discussing both of these problems as they bear on a dynamic theory of role).

<sup>315</sup> See *supra* notes 162–166, 216–217, 311 and accompanying text (giving examples of judges expressing distrust of democracy in both India and Colombia).

<sup>316</sup> See *supra* notes 299–308 and accompanying text (discussing cases from India and Colombia).

probably less corrosive than excluding some political forces from electoral politics, as counseled by the militant democracy model. Exclusion of major political actors plausibly weakens the development of electoral politics and may disenchant some groups of citizens with democracy.<sup>317</sup> Overuse of the unconstitutional constitutional amendments doctrine could cause a variant of the “judicial overhang” problem, dampening the extent to which political actors internalize constitutional values.<sup>318</sup> But this would seem to be a less serious risk to democratic development.

Further, it could be that use of the doctrine has an opposing effect, helping to spread constitutional culture in countries where it is weak or non-existent. Few decisions send a clearer signal of the importance of constitutional values than decisions striking down constitutional amendments because of their inconsistency with those values. These decisions may alert citizens that political actors are posing a substantial danger to principles that the court views as fundamental constitutional values. In practice, a judicial decision striking down a constitutional amendment will rarely act as the final word, but instead may start a dialogue about the importance of the principle in question.<sup>319</sup> In other words, invalidation of constitutional amendments may play a “fire alarm” function, telling the populace that something worth paying attention to is going on.<sup>320</sup>

If this is right, then it means that the truly hard cases are ones like the Colombian “fiscal sustainability” decision.<sup>321</sup> The Court has long pushed an interpretation of the constitution as prioritizing social welfare, arguing that Colombia in its first article is defined as a “social state of right” and issuing influential decisions protecting socioeconomic rights.<sup>322</sup> Indeed, the Court is probably best known for its aggressive enforcement of rights like the right to healthcare and housing.<sup>323</sup> In a mature democratic order, the choice of democratic actors

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<sup>317</sup> See, e.g., RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 487–88 (1991) (referring to the problem of the Argentine Peronist Party being prohibited from winning elections because of its repugnance to elites as an “impossible game” that destabilized the regime).

<sup>318</sup> See TUSHNET, *supra* note 59, at 57–58.

<sup>319</sup> Cf. Thomaz Pereira, *Entrenchment and Constitutional Politics: Interpreting Eternity Clauses* (Apr. 19, 2014) (unpublished manuscript) (finding that “eternity clauses” prohibiting constitutional change to certain articles acted as the start of dialogue rather than as the final word).

<sup>320</sup> See Law, *supra* note 189, at 731–32 (defending judicial review as a “fire alarm,” or a way for citizens to get cheap information about abuses by their government, and as a coordination mechanism).

<sup>321</sup> See Corte Constitucional [C.C.] [Constitutional Court], abril 18, 2012, Sentencia C-288/12, available at <http://www.corteconstitucional.gov.co/relatoria/2012/C-288-12.htm>, archived at <http://perma.cc/8QYL-GUEC>.

<sup>322</sup> See *supra* note 303 and accompanying text.

<sup>323</sup> See, e.g., Manuel José Cepeda-Espinoza, *Transcript: Social and Economic Rights and the Colombian Constitutional Court*, 89 TEX. L. REV. 1699, 1699 (2011) (noting the importance of socioeconomic rights decisions to the Colombian Constitutional Court).

to amend the constitution in order to subordinate social rights to fiscal considerations, or at least to make them weigh equally, would seem defensible as an alternative interpretation of fundamental principles. But in Colombia, there may be some value to the Court's articulation of the "social state of right" principle as a fundamental principle of Colombian constitutionalism. Such a decision might be part of the effort to create a constitutional culture in the country. And the Court's decision has not acted as the final word. The Congress has responded with a law supposedly developing the constitutional amendment but in reality giving the amendment an interpretation that gives "fiscal sustainability" much greater weight than it had in the Court's decision.<sup>324</sup> The resulting exchange may have started something of a political debate about the relative importance and meaning of the "social state of right" criterion in Colombian constitutionalism.

In short, the dynamic theory suggests that many uses of the doctrine are unjustifiable. Nevertheless, it provides some support for at least a limited version of the doctrine of unconstitutional constitutional amendments as a way to preserve democracy against substantial erosion. More tentatively, it may also provide support for a somewhat broader version of the doctrine as a way to identify and publicize fundamental constitutional values.<sup>325</sup>

## CONCLUSION

Recent scholarship has argued that standard constitutional theory asks a question—how to square judicial review with democracy—that it cannot answer in a coherent or satisfying way.<sup>326</sup> Constitutional theorists should therefore arguably seek a different, and more productive, set of questions.<sup>327</sup> This article is an attempt to construct a more practical and productive constitutional theory, at least for a subset of constitutional courts.

The emerging constitutional courts and constitutional orders of what scholars have called the "Global South" merit analysis on their own terms.

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<sup>324</sup> See, e.g., Carlos Parra Dussán, *Incidente de impacto fiscal*, LA REPÚBLICA (Jan. 31, 2014), [http://www.larepublica.co/asuntos-legales/incidente-de-impacto-fiscal\\_106686](http://www.larepublica.co/asuntos-legales/incidente-de-impacto-fiscal_106686), archived at <http://perma.cc/S6T2-ASP3> (Colom.) (noting that the law includes a version of the legal action for fiscal revision that is quite demanding on the judiciary).

<sup>325</sup> A corollary of this point is that a court will be most effective in playing this role if it issues decisions based on clear principles, and which are publicized widely. Many uses of the doctrine seem to fail this test. In the famous Indian case *Indira Nehru Gandhi v. Shri Raj Narain*, for example, members of the Court broadly agreed that the amendment at issue, which stripped courts of jurisdiction over electoral matters, violated the basic structure doctrine. See A.I.R. 1975 S.C. 2299 (1975), available at <http://www.indiankanoon.org/doc/936707/>, archived at <http://perma.cc/9S78-DJBW>. But they disagreed broadly over whether the proper principle to rely on was democracy, equality, or the separation of powers. See *id.*

<sup>326</sup> See Sultany, *supra* note 177, at 371.

<sup>327</sup> See *id.* at 455 ("Perhaps it is more fruitful to ask new questions.").

These courts face a set of institutional and social problems that often dwarf those found in more mature democracies. This paper argues that a defensible conception of judicial role in these systems is a dynamic one, which focuses on courts seeking to improve the quality of democracy over time. The main advantage of such a conception is in suggesting a more fruitful set of questions, most of which need empirical study.

We need more work on the kinds of judicial strategies that are possible in different kinds of political contexts, and also on the effects of those strategies on their political systems. We need to know whether “insider” strategies, which focus on building up political institutions directly, or “outsider” strategies, which focus on building up democratic spaces around political institutions, are more likely to be effective. And most broadly, we need research on the dynamic effects of judicial activism, within initially problematic political orders, on politics and society. To what extent can courts improve the functioning of democratic institutions, build up civil society, or spread constitutional culture? It is remarkable how little we know about the answers to those important questions. The ultimate value of a dynamic theory, then, may be in suggesting an agenda for scholars and judges.